IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-6714

DUNCAN PEDER McKENZIE, JR.,

Petitioner

-v-

STATE OF MONTANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Montana entered November 12, 1976.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Montana, reported at ___ Mont. ___, 557 P.2d 1023 (1976), is set out in Appendix A, infra .

JURISDICTION

The judgment of the Supreme Court of Montana was entered on November 12, 1976. On January 10, 1977, that court denied a timely rehearing petition. On March 29, 1977, Mr. Justice Rehnquist granted an extension of time for the filing of a certiorari petition to and including May 10, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death by hanging for the crimes of deliberate homicide and aggravated kidnaping under the law of Montana violates petitioner's rights under the Sixth, Eighth, or Fourteenth Amendment to the Constitution of the United States?

2. Whether the trial court's ruling that petitioner must establish by a preponderance of the evidence through the introduction of proof of "mental disease or defect" that he did not have a particular state of mind which is an essential element of the crime of deliberate homicide and of aggravated kidnaping violated petitioner's right under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States to require the State to prove beyond a reasonable doubt every fact necessary to constitute the crime charged?

3. Whether the trial court's ruling that petitioner must establish by a preponderance of the evidence the affirmative defense of "not guilty by reason of a mental disease or defect excluding responsibility" violated petitioner's right under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States to require the State to prove beyond a reasonable doubt every fact necessary to constitute the crime charged?

4. Whether the failure of the courts below to enforce a plea bargaining agreement between petitioner, the State, and the trial court, which petitioner's counsel had relied upon in revealing to the State prior to trial petitioner's trial strategy and tactics, deprived petitioner of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

5. Whether the introduction at trial of evidence seized from petitioner's dwelling place and truck parked outside his dwelling place pursuant to a search warrant violated his rights under the Fourth and Fourteenth Amendments to the Constitution of

the United States to be free from searches and seizures under warrants which are not based on probable cause and which do not "particularly describ[e] the . . . things to be seized"?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Montana Revised Codes Annotated (1976 supp.):

§94-5-101:

> "Criminal homicide. (1) A person commits the offense of criminal homicide if he purposely, knowingly or negligently causes the death of another human being.
>
> (2) Criminal homicide is deliberate homicide, mitigated deliberate homicide, or negligent homicide."

§94-5-102:

> "Deliberate homicide. (1) Except as provided in section 94-5-103(1)(a), criminal homicide constitutes deliberate homicide if:
>
> (a) it is committed purposely or knowingly; or
>
> (b) it is committed while the offender is engaged in or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual intercourse without consent, arson, burglary, kidnaping, felonious escape or any other felony which involves the use or threat of physical force or violence against any individual.
>
> (2) A person convicted of the offense of deliberate homicide shall be punished by death as provided in section 94-5-105, or by imprisonment in the state prison for any term not to exceed one hundred (100) years."

§94-5-105(1974 supp.):

> "Sentence of death for deliberate homicide. (1) When a defendant is convicted of the offense of deliberate homicide the courts shall impose a sentence of death in the following circumstances, unless there are mitigating circumstances:
>
> (a) The deliberate homicide was committed by a person serving a sentence of imprisonment in the state prison; or
>
> (b) The defendant was previously convicted of another deliberate homicide; or
>
> (c) The deliberate homicide was committed by means of torture; or

> (d) The deliberate homicide was committed by a person lying in wait or ambush; or
>
> (e) The deliberate homicide was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person."[1]

§94-5-303:

> "Aggravated kidnaping. (1) A person commits the offense of aggravated kidnaping if he knowingly or purposely and without lawful authority restrains another person by either secreting or holding him in a place of isolation, or by using or threatening to use physical force, with any of the following purposes:
>
> (a) to hold for ransom or reward, or as a shield or hostage; or
>
> (b) to facilitate commission of any felony or flight thereafter; or
>
> (c) to inflict bodily injury or to terrorize the victim or another; or
>
> (d) to interfere with the performance of any governmental or political function; or
>
> (e) to hold another in a condition of involunary servitude.
>
> (2) A person convicted of the offense of aggravated kidnaping shall be punished by death as provided in section 94-5-304, or be imprisoned in the state prison for any term not to exceed one hundred (100) years unless he has voluntarily released the victim, alive, in a safe place, and not suffering from serious bodily injury, in which event he shall be imprisoned in the state prison for any term not to exceed ten (10) years."

§95-5-304 (1974 supp.):

> "Sentence of death for aggravated kidnaping. A court shall impose the sentence of death following conviction of aggravated kidnaping if it finds that the victim is dead as the result of the criminal conduct, unless there are mitigating circumstances."[2]

1/ Subsequent to January 21, 1974 (the date of the crimes petitioner was tried for), the Montana Legislature amended the 1973 death penalty statute. Montana Session Laws 1974, c. 126, effective March 11, 1974, amended Mont. Rev. Codes Ann. §94-5-304 to make the death penalty mandatory for aggravated kidnaping. Montana Session Laws 1974, c.262, effective July 1, 1974, amended Mont. Rev. Codes Ann. §94-5-105 to make the death penalty mandatory for deliberate homicide when the victim was "a peace officer killed while performing his duty."

2/ See note 1 supra.

§95-501(1969):

"Mental disease or defect excluding responsibility. (a) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he is unable either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(b) As used in this chapter, the term 'mental disease or defect' does not include an abnormality manifested only by [repeated] criminal or otherwise antisocial conduct."

§95-502(1969):

"Evidence of mental disease or defect admissible when relevant to element of the offense. Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense."

§95-503(1969):

"Mental disease or defect excluding responsibility is affirmative defense -- requirement of notice -- form of verdict and judgement when finding of irresponsibility is made. (a) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish by a preponderance of the evidence.

(b)(1) Evidence of mental disease or defect excluding responsibility is not admissible unless the defendant, at the time of entering his plea of not guilty or within ten (10) days thereafter or at such later time as the court may, for good cause, permit, files a written notice of his purpose to rely on such defense.

(2) The defendant shall give similar notice when in a trial on the merits, he intends to rely on a mental disease or defect, to prove that he did not have a particular state of mind which is an essential element of the offense charged. Otherwise, except on good cause shown, he shall not introduce in his case in chief, expert testimony in support of that defense.

(c) When the defendant is acquitted on the ground of mental disease or defect excluding responsibility, the verdict and the judgment shall so state."

§95-701(1969):

"Searches and seizures -- when authorized. A search of a person, object or place may be made and instruments, articles or things may be seized in accordance with the provisions of this chapter when the search is made:

(a) As an incident to a lawful arrest.

(b) With the consent of the accused or of any other person who is lawfully in possession of the object or place to be searched, or who is believed upon reasonable cause to be in such lawful possession by the person making the search.

(c) By the authority of a valid search warrant.

(d) Under the authority and within the scope of a right of lawful inspection granted by law."

§95-703 (1969):

"Search warrant defined. A search warrant is an order in writing, in the name of the state, signed by a judge, particularly describing the thing or place to be searched and the instruments, articles or things to be seized, directed to a peace officer, commanding him to search for personal property and bring it before the judge."

§95-704 (1969):

"Grounds for search warrant. Any judge may issue a search warrant upon the written application of any person that an offense has been committed, made under oath or affirmation before him which:

(a) States facts sufficient to show probable cause for issuance of the warrant,

(b) Particularly describes the place or things to be searched, and

(c) Particularly describes the things to be seized."

§95-705 (1969):

"Scope of search with warrant. A search warrant may authorize the seizure of the following:

(a) Contraband.

(b) Any instruments, articles or things which are the fruits of, have been used in the commission of, or which may constitute evidence of, any offense.

(c) Any person who has been kidnaped in violation of the laws of this state, or who has been kidnaped in another jurisdiction and is now concealed within this state."

§95-708 (1969):

"Service and execution of search warrants. Service of a search warrant is made by exhibiting the original warrant at the place to be searched. If the warrant is executed, a duplicate copy, and a receipt for all articles taken shall be left with any person from whom any instruments, articles or things are seized, or, if no person is available, the copy and receipt shall be left at the place from which the instruments, articles or things were seized. Failure to give or leave such a receipt shall not render the evidence inadmissible in a trial."

§95-712 (1969):

"Return to court of things seized under search warrant. The return of the warrant and all instruments, articles and things seized shall be made promptly before the judge who issued the warrant, or

if he is absent or unavailable, before the nearest available judge and shall be accompanied by a written inventory of any property taken, verified by the person executing the warrant. The judge shall, upon request, deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant."

§95-2206.1 (1975 supp.):

"Sentence to death. When a person is convicted of an offense punishable by death or imprisonment, the court may sentence the offender to death or imprisonment."

§95-2212 (1969):

"Sentence to be imposed by judge. All sentences under this chapter shall be imposed exclusively by the judge of the court."

§95-2301 (1969):

"Commitment of defendant. Upon rendition of judgment after pronouncement of a sentence imposing punishment of imprisonment or death the court shall commit the defendant to the custody of the sheriff who shall deliver the defendant to the place of his confinement or execution."

§95-2303 (1969):

"Execution of death. (a) The punishment of death must be inflicted by hanging the defendant by the neck until he is dead.

(b) In pronouncing the sentence of death, the court shall set the date of execution which must not be less than thirty (30) days nor more than sixty (60) days from the date the sentence is pronounced.

(c) A sentence of death must be executed within the walls or yard of a jail or some convenient private place in the county where the trial took place.

(d) The sheriff of the county must be present and shall supervise such execution which shall be conducted in the presence of a physician, the county attorney of the county, and at least twelve (12) reputable citizens to be selected by the sheriff. The sheriff shall at the request of the defendant, permit such priests or ministers, not exceeding two (2), as the defendant may name and only persons, relatives or friends, not to exceed five (5), to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. No other persons than those mentioned in this subsection can be present at the execution, nor can any person under age be allowed to witness the same.

(e) After the execution, the sheriff must make a return upon the death warrant, showing time, mode and manner in which it was executed."

§95-3004 (1975 supp.):

"The burden in a homicide trial . . .

(b) In a deliberate homicide, knowledge or purpose may be inferred from the fact that the accused committed a homicide and no circumstances of mitigation, excuse or justification appear."

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Montana, entered on November 12, 1976, affirming petitioner's death sentence. Petitioner, Duncan Peder McKenzie, Jr., was convicted after a jury trial in the District Court of the Eighth Judicial District in and for the County of Cascade, Montana, of deliberate homicide and aggravated kidnaping and was sentenced by the trial court to be hanged.

Ms. Lana Harding was last seen alive about 5:00 p.m., January 21, 1974, leaving the living unit (or "teacherage") of the rural public schoolhouse where she taught, about thirteen miles from Conrad, Montana, T. 1630, 2156, 2158.[3/] When she failed to appear at school the next morning, the mother of one of the students became concerned and went to the teacherage to find her. T. 1632. The mother found Ms. Harding's room somewhat disarrayed, but could not find Ms. Harding, T. 1637-1640, and the county sheriff was notified of her absence at about 9:30 a.m., January 22. T. 473. The sheriff and his deputies arrived at about 9:50 a.m., and searched the premises. This search produced a red tennis shoe found outside the door of the teacherage, T. 1635; some scuff marks, two mats out of place, and a pair of glasses found inside the teacherage, Deposition of Deputy Jerry Hoover, Ct. File Item 30, at p. 6; what appeared to

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3/ References to pages of the trial transcript will hereinafter be preceded by "T.", and references to documents contained in the "Court File" record in the Montana Supreme Court will be preceded by "Ct. File Item."

be a "drag trail" leading out of the teacherage, under a fence, up to the road in front, ibid; T.2125; and a spot of what appeared to be blood near the end of the trail by the road, with a woman's watch nearby.[4/]

A neighbor of Ms. Harding's, one Dan Pearson who lived across the road from the teacherage, told the officers that the previous evening, a man who identified himself as living at "the old Yokum place" about one and a half miles away, T. 2011, had come to Pearson's door and had asked for help in starting his pick-up truck. This man, who was characterized by Pearson as "nervous" and who identified himself as petitioner, had phoned his wife from Pearson's house. T. 2010. Then, the two men had returned to the truck, which was parked near where the officers found the watch and apparent blood stain the next day, and had started the truck. T. 216-217; Deposition of Justice of the Peace Robert Wolfe, Ct. File Item 30, at pp. 6-7.

Later that afternoon, Pondera County Attorney David Nelson visited the teacherage and talked to Deputy Jerry Hoover, who had been involved in the search, T. 2015. The two men returned to Conrad in the late afternoon, T. 2016, where Nelson executed an affidavit[5/] reciting the facts then known to the investigators, and drafted a criminal complaint charging petitioner with assault upon Lana Harding. Ct. File Item 60. Nelson then explained to Justice of the Peace Robert Wolfe what he had learned and been told. The Justice of the Peace placed Deputy Hoover under oath and asked him a few questions. No court reporter was present, and no contemporaneous record was made of Hoover's testimony. Ibid. [6/]

4/ See T. 900-901, 2018.

5/ A copy of this affidavit, Ct. File Item 76, is appended in Appendix D, infra.

6/ According to Wolfe's testimony, Hoover told him of Ms. Harding's disappearance, the scuff marks on the floor of her house, the other items "out of place" there, the tennis shoe found outside her door, the "drag marks" leading up to the road, the presence near the road of a woman's watch and something that

At the conclusion of these proceedings, Justice of the Peace Wolfe signed warrants for petitioner's arrest and for the search of his "residence . . . and the surrounding [curtilage] area" and of "a 1950 black Dodge Pickup truck there." The search warrant authorized seizure of several items of clothing "worn by the Defendant," of several other items of woman's clothing, "and any other controband [sic] articles." Ct. File Item 76; Appendix D, infra.

Pursuant to these warrants, County Attorney Nelson, the Sheriff, and several of his deputies went to the petitioner's residence at around 7:00 p.m., T. 2017-2018, arrested petitioner, seized his pick-up truck (which was parked just in front of his house, T. 905) and its contents (T. 2019), and searched his house, removing from it several items of his clothing, T. 2022. The pick-up was taken to a garage in Conrad and searched the next day. T. 736, 740.

Ms. Harding's partially nude body was found on January 23, a few miles from the teacherage, T. 467-468, 1979, wearing a blouse, sweater, and bra, with a number of severe head wounds, T. 562, and a rope twisted about the neck, T. 553, 585-586.[7/]

On January 24, 1974, petitioner was charged by information with the deliberate homicide of Lana Harding. Ct. File Item 4.[8/] On December 3, 1974, venue of the trial was changed to Cascade County, Montana, T.3, and several motions by appointed defense counsel -- including a motion to suppress the evidence seized from

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6/ (Cont.) "looked like it was blood," and the encounter Dan Pearson had had the night before with petitioner. Deposition of Justice of the Peace Robert Wolfe, Ct. File Item 30, at pp. 5-8. See pp. 60-61, infra.

7/ Other items ultimately introduced in evidence were discovered in farm fields several miles from the teacherage or from where the body was discovered: a pair of leather work gloves with what appeared to be specks of blood on them, T. 897, a pair of rubber men's overshoes, T. 2140, and a woman's purse, T. 2147.

8/ During the next eight months, three "Amended Informations" were filed by the State. Ct. File Items 16, 33, 74.

petitioner's house and truck, T. 2[9] -- were denied. On December 17, 1974, the trial court entered for petitioner a plea of "not guilty", T. 19, to the two counts of deliberate homicide, two counts of aggravated kidnaping, one count of sexual intercourse without consent, and two counts of aggravated assault charged in the third amended information.[10]

Within a few days of the entry of petitioner's plea, defense counsel, County Attorney Nelson and Special Prosecutor Douglas Anderson engaged in lengthy and detailed plea bargaining discussions. On December 22, it was agreed that petitioner would be allowed to plead guilty to deliberate homicide and aggravated assault and that the State would waive the death penalty. Affidavit of Barney Reagan, Esq., Ct. File Item 99, at p. 2. On December 23, the trial judge, Hon. R.J. Nelson, agreed to accept the pleas, with a slight modification in the sentencing agreement. Later that day, as part of the plea agreement, petitioner's counsel described to the State the trial tactics they had planned to use and the weaknesses they perceived in the State's case in order to assist the prosecutors in justifying the agreement to the community and to the victim's family. Id. at 3-4; see pp. 53-56 infra. After learning the details of the defense's trial strategy, however, the State announced on December 28, 1974, that it was abrogating the agreement on account of objections voiced by Ms. Harding's family, and the trial court ruled that the case would proceed to trial. T. 6 (December 30, 1974).

On January 8, 1975, the opening day of trial, the State moved to endorse fifty-eight new witnesses, Ct. File Item 113, a number of whom it wished to call to establish the chain of

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9/ The order denying the motion to suppress, Ct. File Item 90, contained no findings or conclusions and did not specify the grounds on which it sustained the searches. Petitioner had sought such findings from the court. T. 13-14.

10/ The two homicide and two kidnaping counts charged a single instance of homicide and kidnaping respectively, but alleged different methods of commission. See. Ct. File Item 74.

custody over items of physical evidence. T. 80-81, 88. Petitioner objected to this endorsement, partially on the grounds that the need for the foundation witnesses was brought to the prosecutors' attention by the revelations of defense counsel made in reliance on the broken plea bargain agreement. Defendant's Objections, Ct. File Item 114, at p. 2. The Court overruled these objections and allowed the endorsement. T. 91.

Over defense objection, the jury selected on January 8, 1975, was not sequestered, T. 78, 233, 498. The trial judge opened the trial with extensive "preliminary instructions" on matters of law. T. 453. The State established that Lana Harding had died from multiple wounds to the head, T. 560, inflicted by a large, heavy instrument, T. 565. The State's pathologist testified[11] that he could not determine the exact time of death, T. 1424, but that the blows were all inflicted within thirty minutes of death, T. 563, and that the most severe blow preceded death by only a few minutes, T. 564.[12]

The State sought to link petitioner to Ms. Harding's death primarily through the testimony of Dan Pearson, T. 2160-2175, and his father, Gundar, T. 2148-2155, that petitioner had sought assistance in starting his stalled truck near the teacherage the evening of January 21, and through the introduction of a mass of

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11/ Because the pathologist testified that it was possible to present his findings and render his opinion without photographs, petitioner objected to the introduction of photographs the pathologist had taken on the ground that they were inflammatory and unnecessary. One Justice of the Montana Supreme Court dissented from the affirmance of petitioner's conviction and death sentence on the ground that admission of these photographs constituted reversible error. State v. McKenzie, supra, 557 P.2d at 1046-1048 (dissenting opinion of Judge Boyd).

12/ The pathologist noted also that a clothesline rope found around the neck of the body had been tightly enough constricted sometime before the blows were inflicted to the head and between thirty and ninety minutes prior to death, T. 586-588, to cause a loss of consciousness. The doctor also found a tear in the tissue about Ms. Harding's vaginal orifice and a small amount of blood, indicative of sexual intercourse somewhere around the time of death, T. 601, and male seminal fluid in the pubic hair, ibid. but it was impossible to determine when the deposit had been left, T. 602, 1455.

physical evidence[13] -- much of it seized from petitioner's truck and house[14] -- which tended to indicate petitioner's involvement in her abduction.[15] The State also offered testimony from two of petitioner's co-workers that he had made

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13/ The order of the State's presentation was significantly altered from the chronological sequence of events due to the introduction of voluminous testimony concerning the chains of custody over the various items introduced. See, e.g., 474-787, 521-527, 634-637, 646-657, 670-685, 699-717, 767-777, 805-825, 956-972, 1095-1108, 1469-1538, 1918-1955. Establishing the chain of custody with respect to various evidentiary items had been a primary weakness in the State's case perceived by defense counsel and revealed by them to the State in reliance on the subsequently abrogated plea agreement.

14/ Two items taken from petitioner's house were introduced into evidence against him, T. 1062, 2091: a pair of boots, T. 778-779, with a small trace of blood on one of them, T. 1035, the soles of which were similar to prints inside overshoes found discarded in a farm field about two miles from the teacherage, T. 897, with blood and brain tissue on them, T. 1061-1062; and a shirt belonging to petitioner which also had untypeable human blood on it, T. 1205. A number of objects and samples taken from petitioner's truck were also introduced into evidence: an exhaust manifold, T. 1949, similar to the instrument which could have inflicted the fatal wounds on Ms. Harding, T. 1397, which had type O blood T. 1117, brain tissue, T. 1395, and hair similar to Ms. Harding's, T. 1298, under fresh paint on it; a coil of wire, part of which matched a piece of wire found in Ms. Harding's hair, T. 1126; several scrapings from parts of the truck, T. 970, 976-979, which contained type O blood, T. 1188-1192, and sweepings which contained hairs which were microscopically similar to Ms. Harding's, T. 1294-1296, 1307, 1381, and a number of hardware items from the bed of the truck, see, e.g., T. 1872, 1877, 1878, 1935, 1946, with blood, sometimes identifiable as type O, on them, see, e.g., T. 1095-1097, 1103-1112, 1141.

15/ In addition to the items seized from petitioner pursuant to the warrants, the State offered several other items of physical evidence and scientific testimony about them tending to link petitioner to the crime. Most significantly, it showed that petitioner's blood was "O" positive and that he was a "secretor" (i.e., that his blood type could be determined from his saliva or semen) T. 619. The semen found in Ms. Harding's pubic hair, T. 613, the tests revealed, had come from a male with "O" type blood. A pair of gloves was found discarded, T. 897 in the same general area where Ms. Harding's purse and the pair of overshoes with human blood on them, T. 1032, were also found, T. 2140, 2147, and these gloves were similar to work gloves petitioner had been seen wearing, T. 1749. The gloves had stains on them similar in color to the "Red Top" seed treat used at the seed store where petitioner worked, T. 1155.

statements indicating a sexual interest in "country school teachers" in general, T. 2054, and Ms. Harding in particular, T. 1897.

Petitioner, who had a prior conviction for assaulting a woman, T. 2615, did not testify.[16] While he challenged the persuasiveness of the State's evidence to prove the elements of the offenses charged[17] and also sought to demonstrate that some of this evidence may have been tampered with,[18] most of petitioner's own evidence was addressed to the question of whether he could have acted "knowingly" or "purposely" in the commission of a homicide. The trial court construed petitioner's defense as that of "mental disease or defect excluding responsibility." T. 1427-1435. A psychiatrist appointed to examine petitioner, Dr. Robert Wetzler, testified that petitioner was a "schizoid personality," T. 2248, who was unable to form the requisite mental elements of deliberate homicide and aggravated kidnaping, who was unable to appreciate the criminality of his conduct, and who was unable to conform his conduct to the requirements of law, T. 2248, 2321.

In rebuttal, the State introduced the testimony of another

16/ Petitioner initially refused to enter a plea of "not guilty by reason of mental disease or defect excluding responsibility" or to give the statutorily required notice of such a defense, because he claimed that the 1973 Montana Criminal Code's "mental disease or defect" provisions were unconstitutional because (1) they placed upon petitioner the burden of establishing the affirmative defense of mental incompetence by a preponderance of the evidence, and (2) they placed upon petitioner the burden of controverting the assumption that he possessed the requisite mental elements for deliberate homicide, once the State had established an illegal killing. See pp. 40-51 infra. Petitioner refused to give the statutorily required notice for fear of waiving his constitutional objection to the "mental disease or defect" rules. See Ct. File Items 24, 27, 28, 37, 40.

17/ See, e.g., T. 593, 602, 1444, 1455, 1233-1276, 2338-2378.

18/ Defense witnesses testified that, after petitioner had been taken into custody, Ms. Harding's purse had not been found on the night of January 22 in a careful search of the area where it was subsequently found January 23, T. 2218, and that the pickup truck from which so many crucial items of evidence had been taken had, for a time at least, been left unguarded after it was seized and thus could have been tampered with T. 2231.

psychiatrist who had examined petitioner, Dr. Meguel F. Gracia, who testified that petitioner possessed a "passive-aggressive personality" and social maladjustments", T. 2396, but that he was not afflicted with a "mental disease" and could appreciate the criminality of his conduct, T. 2397.[19] A state psychologist testified concerning his "diagnostic impression", on the basis of testing, that petitioner had a"Personality disorder", T. 2559, but that he could appreciate the criminality of his conduct and conform it to law, T. 2547.

Over petitioner's objection, the trial court instructed the jury that "the defendant must prove by a preponderance of the evidence that he suffered from such an abnormality or subnormality of the mind at the time of such conduct that the jury cannot say that it does not have a reasonable doubt as to his responsibility for such conduct." Add. Instr. 53, Ct. File Item 154. The trial court also instructed, over objection, that the jury could consider evidence of "mental disease or defect" which petitioner had introduced on the question whether petitioner had the requisite mental elements of the crimes charged, but that on the deliberate homicide and aggravated kidnaping counts, knowledge or purpose could be inferred from the jury's finding petitioner had committed the acts charged, and that the burden was on petitioner to show the absence of knowledge or purpose through evidence of "mental disease or defect." See pp. 40-51 infra.

Six possible verdicts were submitted to the jury,[20] and it

19/ Dr. Gracia based this conclusion partially on his observations of petitioner's "thought content" in refusing to discuss the crime with which he was charged, T. 2400, on the advice of his attorney. Dr. Gracia concluded that this refusal was "rationalization." Other "symptoms" which Dr. Gracia cited in support of his diagnosis that petitioner possessed merely a "personality disorder" were "insecurity," T. 2409, "hostility", T. 2411, and suppressed anger, T. 2413-2414.

20/ These verdicts were: "Mental Disease or Defect Excluding Responsibility for Conduct," "Deliberate Homicide" (with or without torture), "Aggravated Kidnaping" (with or without causing the death of the victim), "Sexual Intercourse Without Consent," "Aggravated Assault," "Kidnaping," "Not Guilty of Any of the Offenses Charged." Add. Instr. 54, Ct. File Item 154.

found petitioner guilty of "Deliberate Homicide by Means of Torture," and "Aggravated Kidnaping", accompanied by the death of the victim. T. 2605. The trial court ordered the preparation of a pre-sentence investigation report, which was disclosed to petitioner, and a sentencing hearing was held on March 3, 1975, before the trial court, sitting without a jury, as required by Montana law. In written "Findings, Conclusions, Sentence and Order," Ct. File Item 169; attached infra as Appendix B, the trial court stated that "[t]he evidence in the case, and as found by the jury discloses a brutal, conscienceless, torture, rape and deliberate killing of a human being," id. at 7; that petitioner could distinguish right from wrong but was "dangerous and potentially dangerous", ibid.; that he had previously been convicted of an aggravated assault on a woman and that the chances of his rehabilitation were "practically nonexistent," id. at 8, and that under Montana law "he would only be required to service [sic] approximately seven years . . . before he would be turned loose to menace society again," id. at 9. The trial court found that "there are no circumstances which mitigate the defendant's conduct or the sentence to be imposed," ibid., and sentenced petitioner to be hanged for deliberate homicide and aggravated kidnaping.[21]

On November 12, 1976, the Supreme Court of Montana affirmed petitioner's conviction and sentence, with one Justice dissenting.

21/ Petitioner was not sentenced separately for these two crimes. The trial court concluded that "[t]he offenses of which the defendant has been found guilty are of equal gravity before the law and result from the same transaction, and therefore only one sentence may be imposed though he was found guilty of two offenses." Findings, Conclusions, Sentence and Order, Ct. File Item 169, at p. 9.

On February 23, 1977, The District Court of the Eighth Judicial District in and for the County of Cascade fixed March 31, 1977, as the date for the execution of petitioner's death sentence. The Supreme Court of Montana set aside this date in an order entered pursuant to petitioner's application for a writ of supervisory control, Montana ex rel. McKenzie v. District Court, Mont. Sup. Ct. No. 13743 (March 14, 1977), and ordered a new execution date to be set upon proper notice to petitioner's counsel. The district court, after notice, conducted a hearing on March 31, 1977, and there rescheduled the execution for May 20, 1977. A petition for a stay of execution is now pending before the district court.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Petitioner's Petition and Motion in Mitigation, Ct. File Item 162, urged that the 1973 Montana death penalty statute was unconstitutional under "the rule expressed in Furman v. Georgia", and under the Eighth Amendment to the Constitution of the United States, id. at 1, 4, and moved the trial court "[t]o not impose a sentence of death," id. at 5. Petitioner's Specification of Error No. 25 alleged that petitioner's sentence of death was imposed in violation of the "Fifth, Sixth, Eight, Ninth & Fourteenth" Amendments to the Constitution of the United States, Brief of Appellant at 466, and the Montana Supreme Court rejected this contention. State v. McKenzie, supra, 557 P.2d at 1028-1034.

II. During trial, petitioner filed a written "Motion to Require Proof of Ability to Have a Particular Mental State," Ct. File Item 143, and submitted a proposed instruction that "the State must prove that Defendant had the necessary state of mind to have acted . . . either 'knowingly' or 'purposely' beyond a reasonable doubt," Defendant's Instruction No. 13, Ct. File Item 153. The trial court denied this Motion and instruction, T. 2208, 2598-2599. Petitioner's Specification of Error No. 19 raised this issue in the Montana Supreme Court, Brief of Appellant at 364-369. That court rejected this contention: "It is clear that in the usual case the juror must rely on his normal mental processes to determine if the defendant did an act 'purposely' or 'knowingly.'" State v. McKenzie, supra, 557 P.2d at 1043.

III. Petitioner filed a "Motion for Dismissal," Ct. File Item 135, which contended that Montana's requirement that a criminal defendant establish "mental disease or defect excluding responsibility" as an affirmative defense by a preponderance of the evidence violated the Fourteenth Amendment to the Constitution of the United States, and this Motion was denied, T. 1372. Petitioner's Specification of Error No. 19 reiterated this contention on appeal, but the Montana Supreme Court upheld the constitutionality of "the mental defect or disease provisions in the Code of Criminal Procedure," State v. McKenzie, supra, 557 P.2d at 1043.

IV. On January 3, 1975, before trial, petitioner filed a "Motion to Enforce Agreement of December 23, 1974," Ct. File Item 104, which contended that failure to enforce a plea bargaining agreement deprived petitioner of "due process of the law under the United States . . . Constitutio[n]," id. at 3. This motion was denied, T. 60, and petitioner's Specification of Error No. 2 alleged this refusal to enforce the agreement as error. The Montana Supreme Court held that Santobello v. New York, 404 U.S. 257 (1971), was "not applicable", State v. McKenzie, supra, 557 P.2d at 1038, and rejected the claim.

V. Prior to trial, petitioner moved to suppress items seized from his house and truck on the ground that they had been seized in violation of his rights under the Fourth Amendment to the Constitution of the United States, Ct. File Item 50. The trial court entered an order denying this motion, Ct. File Item 90, and petitioner's Specification of Error No. 1 alleged the denial of this motion as error. The Montana Supreme Court found "no merit in defendant's contention that there was no probable cause for the . . . search warrant." State v. McKenzie, supra, 557 P.2d at 1034.

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION OF DEATH BY HANGING FOR THE CRIMES OF DELIBERATE HOMICIDE AND AGGRAVATED KIDNAPING UNDER THE LAW OF MONTANA VIOLATES PETITIONER'S RIGHTS UNDER THE SIXTH, EIGHTH, OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

This case involves the first death sentence imposed under the 1973 Montana capital punishment statute enacted in the wake of Furman v. Georgia, 408 U.S. 238 (1972).[22] Mont. Sess. Laws 1973, c. 513, §1.[23] The relevant statutes provide:

> "Sentence of death for deliberate homicide. (1) When a defendant is convicted of the offense of deliberate homicide the court shall impose a sentence of death in the following circumstances, unless there are mitigating circumstances:
>
> (a) The deliberate homicide was committed by a person serving a sentence of imprisonment in the state prison; or
>
> (b) The defendant was previously convicted of another deliberate homicide; or
>
> (c) The victim of the deliberate homicide was a peace officer killed while performing his duty; or
>
> (d) The deliberate homicide was committed by means of torture; or
>
> (e) The deliberate homicide was committed by a person lying in wait or ambush; or

22/ In 1974, the Montana Supreme Court invalidated the State's previous capital sentencing procedure: "Furman invalidates death sentences imposed under statutes such as our section 94-2505 . . . because of the unfettered discretion lodged in the judge . . . . that allows the sentencer discretion whether or not to impose the death penalty upon conviction." State v. Rhodes, 164 Mont. 455, 524 P.2d 1095, 1099 (1974).

23/ See note 1, supra.

> (f) The deliberate homicide was committed as a part of a scheme or operation which, if completed, would result in the death or more than one person."[24]

Mont. Rev. Codes Ann. §94-5-105 (1974 supp.)

> "Sentence of death for aggravated kidnaping. A court shall impose the sentence of death following conviction of aggravated kidnaping if it finds that the victim is dead as the result of the criminal conduct, unless there are mitigating circumstances."

Mont. Rev. Codes Ann. §94-5-304 (1974 supp.)[25]

The determination whether sufficient undefined "mitigating circumstances" exist to justify the imposition of a sentence less than death is to be made "exclusively" by the trial court. Mont. Rev. Code Ann. §95-2212 (1969). No standards or procedures are provided for this sentencing discretion. The Montana Criminal Code Commission thus explained the Montana Legislature's reaction to Furman:

> "if any capital punishment statute is to achieve constitutional approval it must be both mandatory and specific. Subsection (1) purports to establish mandatory capital punishment by use of the term 'shall.' This is followed by a humanistic escape valve in the phrase, 'unless there are mitigating circumstances.' The terms are apparently contradictory -- but, in fact, the mandatory language is subject to the exception and ultimately only a test case in the United States Supreme Court can ascertain the constitutionality of the provision."

Criminal Code Commission Comment to Mont. Rev. Codes Ann.

24/ For the definition of "deliberate homicide", see p.3 supra.

25/ For the statutory definition of "aggravated kidnaping", see p.4 supra. See also note 1 supra.

§94-5-105 (1973 supp.).[26]

When the Supreme Court of Montana vacated pre-Furman death sentences in 1974, it commented that:

> "Subsequently [to Furman], the Legislature enacted into law a mandatory death penalty. We emphasize here that our [present] holding does not in any way purport to rule on the validity of the new statute." State v. Rhodes, supra, note 22, 524 P.2d at 1101.

In its subsequent consideration of petitioner's appeal, that court reviewed the 1973 death penalty statute in light of this Court's decisions in Gregg v. Georgia, 428 U.S. 153 (1976), and companion cases. It upheld the constitutionality of the statute noting that "[t]he sentencing procedure . . . requires the individual characteristics of the person convicted be considered," State v. McKenzie, supra, 557 P.2d at 1030, that "[r]eview of the sentence imposed is provided for," ibid., and that "'jury participation in the sentence' is [not] a necessity for constitutionality," id. at 1031. Imposition and affirmance of the death penalty for the crimes of deliberate homicide by torture and aggravated kidnaping present a number of questions meriting review by this Court.

26/ This Comment is appended to the provision of the new Criminal Code authorizing the death penalty for deliberate homicide. The Commission Comment to the aggravated kidnaping penalty provision adopts this explanation for that provision as well: "It [the death penalty authorization for aggravated kidnaping] is parallel to and consistent with the death penalty for deliberate homicide (section 94-5-105). The initial comments of that section are applicable to this section." Criminal Code Commission Comment to Mont. Rev. Codes Ann. §94-5-304 (1973 supp.).

A. The Failure of Montana to Meet the Procedural Requirements of Furman v. Georgia.

Petitioner has plainly been condemned under a capital sentencing procedure that fails to "address the concerns expressed by the Court in Furman," Gregg v. Georgia, supra, 428 U.S. at 180. Montana's 1973 statute consists simply of a broad mandatory death penalty for five categories of "deliberate homicide" and any "aggravated kidnaping" resulting in the death of the victim, subject to "a humanistic escape valve in the phrase 'unless there are mitigating circumstances.' Criminal Code Commission Comment to Mont. Rev. Codes Ann. §94-5-105 (1973 supp.). The "humanistic escape valve" is, of course, nothing new or local to Montana: it resurrects an antiquated pre-Furman death-sentencing formula under which the defendant is required to be hanged unless undefined "mitigating circumstances" are found. See, e.g., Winston v. United States, 172 U.S. 303 (1899)(rejecting the "mitigating circumstances" approach as a matter of federal practice). Judicial discretion to impose or not impose the death penalty is not meaningfully circumscribed by such a formula. This Court squarely so held in 1972 when, pursuant to Furman, it vacated death sentences imposed under the laws of at least three States that used the same formula. Tilford v. Page, 408 U.S. 939 (1972)(per curiam)(see, e.g., Jones v. People, 146 Colo. 40, 360 P.2d 686, 692 (1961); Jones v. People, 155 Colo. 148, 393 P.2d 366, 367-368 (1964); Williams v. Kentucky, 408 U.S. 938 (1972)(per curiam)(see e.g., Edwards v. Commonwealth, 298

Ky. 366, 182 S.W.2d 948, 951 (1944)); Herron v. Tennessee, 408 U.S. 937 (1972)(per curiam)(see Tenn. Code Ann. §39-2406 (1955); e.g., Woodruff v. State, 164 Tenn. 530, 51 S.W.2d 843, 848 (1932)).

The Montana statute has therefore "simply papered over the problem of unguided and unchecked . . . discretion" in death sentencing, Woodson v. North Carolina, 428 U.S. 280, 203 (1976)(plurality opinion) and has failed to provide the constitutionally requisite "informed, focused, guided, and objective inquiry into the question whether [a particular defendant] . . . should be sentenced to death," Proffitt v. Florida, supra, 428 U.S. at 259 (plurality opinion). This 1973 statute merely combines the vices of the death-sentencing procedures that this Court found unconstitutional in 1972 and 1976. It first makes a mandatory death penalty the presumptive sentence for a broad roster of criminal offenses, see Roberts v. Louisiana, 428 U.S. 325 (1976), and then allows the trial court to impose a lesser sentence in a manner that continues the pre-Furman regime of "complete judicial discretion," State v. Palen, 120 Mont. 434, 186 P.2d 223, 224 (1947), unguided and uncontrolled by any standards that would "focus . . . attention on the particularized nature of the crime and the individual defendant," Gregg v. Georgia, supra, 428 U.S. at 206 (plurality opinion).

Simply narrowing the range of capital crimes[27] or substituting standardless judicial discretion for standardless jury discretion in capital sentencing[28] does not meet Eighth

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27/ In the aftermath of Furman, this Court and lower courts invalidated discretionary death sentences for crimes much more narrowly defined than those for which petitioner was condemned, see, e.g., Duling v. Ohio, 408 U.S. 936 (1972)(see former Ohio Rev. Code Ann. §2910.04 (1953); Ohio Acts 1925, (Vol. CXI, p. 77)); People v. Fitzpatrick, 32 N.Y.2d, 346 N.Y.S.2d 793, N.E.2d 139(1973); People ex rel. Rice v. Cunningham, 51 Ill.2d 353, 336 N.E.2d 1 (1975). See generally, Roberts v. Louisiana, supra,(plurality opinion).

28/ Many discretionary death sentences reversed in the wake of Furman had been imposed by a judge after a bench trial, see, e.g., Cunningham v. Maryland, 408 U.S. 938 (1972)(see Cunningham v. State, 247 Md. 404, 231 A.2d 501 (1967)); Pope v. Nebraska, 408 U.S. 933 (1972)(see State v. Pope, 186 Neb. 489, 184 N.W.2d 395 (1971)); Staton v. Ohio, 408 U.S. 938 (1972) (see State v. Staton, 25 Ohio St.2d 107, 267 N.E.2d 122 (1971)); or upon a guilty plea, see, e.g., Alvarez v. Nebraska, 408 U.S. 937 (1972)(see State v. Alvarez, 185 Neb. 557, 177 N.W.2d 591 (1970)); Menthen v. Oklahoma, 408 U.S. 940 (1972)(see Menthen v. State, 492 P.2d 351 (Okla. Crim. App. 1971)).

In Proffitt v. Florida, supra, 428 U.S. at 253 (plurality opinion), the Court ruled that sentencing judges must be "given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life." The argument that "trial judges can be trusted to exercise their discretion in a responsible manner" and need no standards or guidance "is inconsistent with the basis upon which the Florida capital sentencing procedure was upheld" in Proffitt. Gardner v. Florida, 45 U.S.L.W. 4275, 4278 n.11 (U.S., Mar. 22, 1977). This Court's Eighth Amendment capital punishment decisions "require that the sentencing authority, be it judge or jury, weigh the aggravating and mitigating factor in light of specific and detailed guidelines." Rockwell v. Superior Court, ___Cal.2d __, 134 Cal.Rptr. 650, 556 P.2d 1101, 1112 (1976). And they forbid death sentencing, though "the penalty is limited" to certain crimes, where the sentencing agency has the raw "discretion to decide, case by case, whether that ultimate punishment should be inflicted." People v. Fitzpatrick, 32 N.Y.2d 499, 346 N.Y.S.2d 793, 802, 300 N.E.2d 13 (1973).Nothing in them validates a system which simply "permits reduction of an otherwise mandatory death penalty only if the sentencing authority finds mitigating circumstances sufficient to warrant mercy." Rockwell v. Superior Court, supra, 556 P.2d at 1112.

Amendment requirements. See People ex rel. Rice v. Cunningham, 61 Ill.2d 353, 336 N.E.2d 1 (1975).[29] Whether petitioner McKenzie lived or died depended on whether the trial court found the death penalty "justified," Ct. File Item 169; Appendix B, infra, at 9, for the two capital crimes of which petitioner had been convicted. While the trial court assigned various reasons for its decision that this petitioner should be hanged,[30] neither the aggravating nor the mitigating

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29/ In Cunningham, the Illinois Supreme Court struck down a post-Furman death penalty statute indistinguishable from Montana's primarily on the state constitutional ground that the three-judge sentencing courts it created were unauthorized. But the court made the "additional observation" that the statute, which provided for the death penalty for certain specified crimes unless "compelling reasons for mercy" were found by the court, was "defective because it does not contain standards to be considered in determining whether there are 'compelling reasons for mercy' and the imposing of a sentence other than death." 336 N.E.2d at 6. One Justice "concur[red] with the majority that "[t]he 'compelling reasons for mercy' test is too vague and indefinite and permits a degree of arbitrariness in the imposition of the death penalty not permissible under Furman." Id. at 7.

30/ Petitioner's counsel protested that the determination of the presence or absence of statutorily undefined "mitigating circumstances" was the kind of amorphous and discretionary standard condemned in Furman, Petition and Motion in Mitigation, Ct. File Item 162, at pp. 1-2. Counsel asserted that they were unable to determine exactly what "matters in mitigation" they could legitimately present, id. at 2-3. The defense did offer several considerations to the court as mitigating factors: petitioner's youth, id. at 3, his deprived and rootless background, ibid., his "mental disease" or "personality disorder" found by psychiatrists for both the defense and prosecution, ibid., and the court's previous agreement to sentence him to a term of imprisonment upon his guilty plea, id. at 4. The court's written Findings, Conclusions and Sentence, Ct. File Item 169; Appendix B, infra, discusses primarily nonstatutory factors in aggravation -- the seriousness of the crime, the "dangerousness" of the defendant, and his prior record, id. at 7-8 -- and the need to keep him from being "turned loose to menace society again," id. at 9.

factors have any statutory basis. In different cases, other courts may analyze aggravation and mitigation in wholly contradictory ways (or may treat aggravation -- or the aggravating circumstances found in petitioner's case -- as wholly irrelevant).[31] Moreover, the system contains a built-in "'Sentence first, verdict afterwards,'"[32] bias in favor of death, for the trial judge's deliberation begins with a jury's finding whose effect is to impose a death sentence unless the court

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31/ In Gregg v. Georgia, supra, the Court upheld a statute which defined aggravating but not mitigating factors. The Georgia and Montana statutes differ in a number of important respects, however. First, the Georgia statute explicitly set forth the aggravating factors which would justify a death penalty. These factors performed the function of guiding Georgia juries or judges in the selection of particular defendants to die from among the larger death-eligible pool of capitally-convicted offenders. There is no similar selective procedure or list of guiding factors in Montana, where undefined "mitigating circumstances" constitute the only instrument for deciding whom to spare and whom to kill. Second, the iteration of these factors in the Georgia statute gave at least minimal guidance to a sentencer and to defense counsel as to what might be admissible and persuasive in mitigation. Third, the same jury or trial judge made the decision as to guilt and sentence in Georgia; in Montana, however, there is no way for the sentencing court to know reliably what the jury found at the first stage to justify its capital verdict. Finally, the Georgia statute did not mandate imposition of the death penalty upon the finding of an aggravating circumstance.

32/ L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND (Collier ed. 1962) at 150.

finds mitigation.[33] Appellate review atop a sentencing system like this can do nothing to rationalize the crazy-quilt sentencing pattern in a sparsely populated State who last execution occurred in 1943.[34] The Court should accordingly grant

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33/ "[T]he particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death" is a constitutionally indispensable part of the process of inflicting the penalty of death," Woodson v. North Carolina, supra, 428 U.S. at 303 (plurality opinion), but a Montana trial judge comes to this stage only after a jury verdict has been pronounced -- and publicized -- which condemns a defendant without a consideration of individualizing circumstances. This prejudgement of the sentencing issues deprives a capital defendant of the fair sentencing hearing which is guaranteed him by the Eighth and Fourteenth Amendments. See Gardner v. Florida, supra. This process fails to assure "reliability in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina, supra, 428 U.S. at 305 (plurality opinion), for it unnecessarily subjects a judge to the public pressure attendant upon the reducing of a jury-imposed sentence of death in order to assure the defendant the kind of hearing that is his constitutional right. Such a procedure is tantamount to the beginning of a criminal trial on the issue of guilt by a public proclamation that the defendant is guilty. The pressures upon a trial judge who must appear to overrule the considered decision of twelve citizens who have sat through the trial of a case and rendered a capital verdict constitute too great a threat to the judge's impartiality to be permitted consistently with the Eighth and Fourteenth Amendment. See generally Tumey v. Ohio, 273 U.S. 510 (1927); Ward v. City of Monroeville, 409 U.S. 57 (1972); Connally v. Georgia, 45 U.S.L.W. 3461 (U.S., Jan. 10, 1977).

34/ The Montana Supreme Court "noted" that it "looks at the total record during its review [of sentences imposed in the trial court] to determine whether the sentence was influenced by passion, prejudice or any other arbitrary factor; whether the evidence supports the finding of a statutory aggravating circumstance; and whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." State v. McKenzie, supra, 557 P.2d at 1034. This language appears to be borrowed from Ga. Code Ann. §27-2534.1(c) (1975 supp.):

> "With regard to the sentence, the court shall determine:
> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

certiorari to determine whether "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion [is here] . . . suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, supra, 428 U.S. at 189 (plurality opinion).

34/ cont'd.

> (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

After stating what it would "look to" in assessing the propriety of a death sentence imposed under the 1973 statute, the Montana Supreme Court simply stated "We affirm." State v. McKenzie, supra, 557 P.2d at 1034. It is unclear what its "statutory aggravating circumstance" language means since the Montana death penalty statute does not contain any of these, although the Georgia statute does. A concurring opinion below indicated that appeal to the Montana Supreme Court would determine the "legality of the sentence imposed," while a later discretionary application to the Sentence Review Division of the Court would "determine the appropriateness of the sentence with respect to the individual offender and particular offense." State v. McKenzie, supra, 557 P.2d at 1046 (concurring opinion of Mr. Justice Haswell). The fundamental defect in the Montana scheme, however, as pointed out supra, is that an appellate review system without adequate legislative standards violates the Eighth Amendment because it fails to channel and regularize sentencing discretion. In the aftermath of Furman, this Court vacated a number of death sentences which had been reviewed by state appellate courts and affirmed on the express ground that the facts and circumstances warranted the extreme penalty. See, e.g., Alford v. Eyman, 408 U.S. 939 (1972)(see State v. Alford, 98 Ariz. 124, 402 P.2d 551, 557 (1965); Ariz. Rev. Stat., §13-1717); Hurst v. Illinois, 408 U.S. 935 (1972)(see People v. Hurst, 42 Ill.2d 217, 247 N.E.2d 614 (1969)); Alvarez v. Nebraska, 408 U.S. 937 (1972)(see State v. Alvarez, 182 Neb. 358, 154 N.W.2d 746, 748 (1967); Neb. Rev. Stat., §29-2308); Fesmire v. Oklahoma, 408 U.S. 935 (1972)(see Fesmire v. State, 456 P.2d 573, 586-587 (Okla. Ct. Cr. App. 1969)); Phelan v. Brierly,408 U.S. 939 (1972)(see Commonwealth v. Phelan, 427 Pa. 265, 234 A.2d 540 (1967); cf. Commonwealth

B. Total Lack of Jury Participation in Capital Sentencing.

In the last ten years, Montana and a very few other States[35] have reversed the historical evolution since the middle of the last century toward "jury sentencing in capital cases, McGautha v. California, 402 U.S. 183, 200 n.11 (1971), by removing the jury altogether from the sentencing process. Although this Court has "never suggested that jury sentencing is constitutionally required," Proffitt v. Florida, supra, 428 U.S. at 252 (plurality opinion), (emphasis added) it has neither considered nor approved a capital sentencing system which totally excludes jury participation in the life-or-death decision. The Court has allowed only one encroachment upon the jury's traditional sentencing power in a capital case: the power of a Florida trial judge to impose a death sentence where a jury's recommendation of life imprisonment is clearly unreasonable. See Proffitt v.

34/ cont'd.

v. Hough, 358 Pa. 247, 56 A.2d 84, 85-86 (1948) with Commonwealth v. Edwards, 380 Pa. 52, 110 A.2d 216, 217 (1955).

35/ See Neb. Rev. Stat. §29-2522 (1973 supp.); Ohio Rev. Code Ann. §2929.03(C)(Page 1973 spec. supp.); Ariz. Rev. Stat. §13-454(A)(1974 supp.).

Florida, supra.[36] This precedent obviously does not resolve the constitutionality of Montana's procedure. The Court should review the question whether Montana's total exclusion of the jury from capital sentencing decision is consistent with the "evolving standards of procedural fairness in a civilized society," Gardner v. Florida, supra, 45 U.S.L.W. at 4277 (plurality opinion), "employed by the State to select persons for the unique and irreversible penalty of death," Woodson v. North Carolina, supra, 428 U.S. at 287 (plurality opinion) (footnote omitted).

Several considerations cast the gravest constitutional doubt upon this procedure:

First, the evolution of capital sentencing practice in this country, see Woodson v. North Carolina, supra, 428 U.S. at 289-299 (plurality opinion), has recognized jury participation in the decision whether life should be taken for a

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36/ The Court described Florida's sentencing system as follows:

> "The jury's [sentencing] verdict is determined by majority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that '[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.' Tedder v. State, 322 So.2d 908, 910 (1975)."

Proffitt v. Florida, supra, 428 U.S. at 248-249 (plurality opinion). In Florida, therefore, there is a substantial presumption that the jury's advisory sentence will, in fact, be imposed. See Gardner v. Florida, supra, 45 U.S.L.W. at 4278 (plurality opinion). In Montana, however, the jury plays no role in sentencing whatsoever.

capital crime as a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). By the middle of the twentieth century, every American jurisdiction utilizing the death penalty had decided to "take from the judge the onus of inflicting capital punishment," United States v. Jackson, 390 U.S. 570, 576 n.12 (1968); Woodson v. North Carolina, supra, 428 U.S. at 291-292 (plurality opinion) and decided that if a capital "defendant preferred the commonsense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). See McGautha v. California, supra, 402 U.S. at 200 n.11; McElroy v. United States, 361 U.S. 249, 255 (1960)(dissenting and concurring opinion of Justice Harlan). The determination to include in the process of capital sentencing "a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in" executing a particular defendant, Humphrey v. Cady, 405 U.S. 504, 509 (1972)(footnote omitted), constitutes "a fundamental decision about the exercise of official power," and reflects "a reluctance to entrust plenary powers over . . . life . . . to one judge or to a group of judges." Duncan v. Louisiana, supra, 391 U.S. at 156.[37/] The reversal of that decision by

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37/ See, e.g., Bloom v. Illinois, 391 U.S. 194, 202 (1968); Codispoti v. Pennsylvania, 418 U.S. 506, 515 (1974); Mayberry v. Pennsylvania, 400 U.S. 455, 463-466 (1971); Taylor v. Hayes, 418 U.S. 488, 501-503 (1974). And see Groppi v. Leslie, 404

Montana and a few other States is clearly "attributable to diverse readings of this Court's multi-opinioned decision in" Furman, Woodson v. North Carolina, supra, 428 U.S. at 299 (plurality opinion), rather than to a "sudden reversal of societal values regarding the imposition of capital punishment," id. at 298.

Second, jury participation in sentencing has traditionally assured a "'link between contemporary community values and the penal system,'" Woodson v. North Carolina, supra, 428 U.S. at 295 (plurality opinion), "without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' Trop v. Dulles, 356 U.S. 86, 101," Witherspoon v. Illinois, 391 U.S. 510, 520 n.15 (1968). Sentencing juries provide the most "direct source of information reflecting the public's attitude toward capital punishment," Furman v. Georgia, 408 U.S. 238, 439-440 (1972) (dissenting opinion of Mr. Justice Powell); and see Gregg v. Georgia, supra, 428 U.S. at 181-182 (plurality opinion); their judgments reveal that "under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers," Woodson v. North Carolina, supra,

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37/ cont'd.

U.S. 496, 504-506 (1971). When life is at stake, jury sentencing "'places the real direction of society in the hands of the governed . . . and not in . . . the government,'" Powell, Jury Trial of Crimes, 23 WASH. & LEE L. REV. 1, 5 (1966) (citing DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282 (Reeve transl. 1948)).

428 U.S. at 296 (plurality opinion), and that "this most irrevocable of sanctions should be reserved for a small number of extreme cases," Gregg v. Georgia, supra, 428 U.S. at 182 (plurality opinion). Trial judges, on the other hand, because of their education, training and relative insulation are particularly poor repositories of "contemporary community standards" and have historically been significantly more willing than juries to impose the death penalty.[38] The jury and the legislature are the two crucial "indicators of evolving standards of decency respecting the imposition of punishment in our society," Woodson v. North Carolina, supra, 428 U.S. at 293 (plurality opinion), and only the jury is "directly involved," Gregg v. Georgia, supra, 428 U.S. at 181 (plurality opinion), and able to bring those standards to bear on the facts of a particular case. At a time when society has rejected "the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender,'" Roberts v. Louisiana, supra, 428 U.S. at 333 (plurality opinio the jury's Eighth Amendment judging function is vitally necessary inasmuch as its voice is uniquely "that of the

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38/ See KALVEN & ZEISEL, THE AMERICAN JURY 436, 306-312 (1966).

> "[A]mong the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, criminologists, sociologists penalogists, psychologists, doctors and writers on social science and criminology are, in their great majority, abolitionists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generall

society against which the crime was committed," Williams v. New York, 337 U.S. 241, 253 (1949)(dissenting opinion of Justice Murphy).

Finally, Montana's procedure of holding the mitigation hearing before the trial court deprives a capital defendant of his right to have a jury find facts which determine whether he lives or dies.[39] Constitutional protections apply not only to procedures which determine "guilt or innocence but also

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38/ cont'd.

> jurists with a traditional training and judges."

UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10)(1968) at 64. See also KOESTLER, REFLECTIONS ON HANGING (Amer. ed. 1957) at 21-40.

39/ The verdicts returned by the jury found petitioner guilty of "deliberate homicide by means of torture" and "aggravated kidnaping" which had caused the death of the victim. T. 2605. The jury was at no point informed by the trial court that the consequences of these verdicts -- unless the court found "mitigating circumstances"-- would be the execution of petitioner, and its factual determinations were not dispositive with regard to the sentencing issues which the trial judge ultimately resolved. The jury made no findings whether the crimes for which it convicted petitioner were sufficient to justify the death penalty or whether there were countervailing "mitigating circumstances" present, and it had no chance to evaluate the contents of the presentence report and the testimony and argument presented at the mitigation hearing.

. . . [to those which affix] the degree of criminal culpability," Mullaney v. Wilbur, 421 U.S. 684, 697-698 (1974). See Gardner v. Florida, supra. Montana has determined that only some deliberate homicides are to be punished with death. It is the necessity of making new factual findings in aggravation and mitigation[40/] which triggers petitioner's rights to a jury determination, at least of these factual questions if not of the ultimate question of punishment, at this second stage of the proceedings. For the Montana death penalty statutes do "not make the commission of a specified crime the basis for sentencing. [They] . . . mak[e] . . . [the] conviction the basis for commencing another proceeding . . . to determine whether a person constitutes a threat of bodily harm to the public" sufficient to justify execution. Specht v. Patterson, 386 U.S. 605, 608 (1967). Not all factors affecting criminal sentencing determinations must be decided by a jury,[41/] but Mullaney v. Wilbur, supra, and Gardner v. Florida, supra, stand for the proposition that where the determination of certain factors is of crucial significance -- where they "may be of greater importance than the difference between guilt or innocence for many lesser crimes" --

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40/ Although the trial court's statutory directive was simply to determine whether "mitigating circumstances" existed, the bulk of Judge Nelson's findings in this case concerned the existence of aggravating factors other than the "torture" which the jury had found to accompany the deliberate homicide. See Appendix B, infra.

41/ Cf. Specht v. Patterson, supra, and Townsend v. Burke, 334 U.S. 736 (1948), with Williams v. Oklahoma, 358 U.S. 576 (1959); and Williams v. New York, 337 U.S. 241 (1949).

the State may not lessen the standards by which those factors must be proved by "characterizing them as factors that bear solely on the extent of punishment." Mullaney v. Wilbur, supra, 421 U.S. at 698.[42/] This Court should therefore determine whether petitioner had a constitutional right to a jury's factual evaluation of the propriety of the death penalty before the ultimate penalty was imposed by the trial court.

C. Unreliability of the Factual Predicate of of Petitioner's Death Sentence.

This Court has recognized that "[b]ecause of [the] . . . qualitative difference [between the death penalty and a sentence of imprisonment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina, supra, 428 U.S. at 305 (plurality opinion) (footnote omitted). Because "the action of the sovereign in taking the life of one of its citizens . . . differs dramatically

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42/ Judge Friendly held in United States v. Kramer, 289 F.2d 909 (CA2 1961), that where an aggravating circumstance is not "an element of the crime but rather a fact going only to the degree of punishment," and where the presence of the aggravating circumstance substantially increases the severity of possible sentencing consequences, it must be assumed that "the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than by the sentencing judge." Id. at 921. The aggravating circumstance involved in Kramer (the fact that embezzled commercial paper exceeded $100 in value) raised the crime from a misdemeanor to a felony. Id. at 920. The Kramer principle "is now well recognized. United States v. DeVall, 462 F.2d 137, 142 (CA5 1972).

from any other legitimate state action, [i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice and emotion." Gardner v. Florida, supra, 45 U.S.L.W. at 4277 (plurality opinion).

In this case, the written findings of the trial court, on the basis of which petitioner was sentenced to death, contain two significant factual errors. First, although the trial court submitted to the jury a verdict of "Sexual Intercourse Without Consent: Guilty", Add. Instr. 54, Ct. File Item 154, the jury did not find petitioner guilty of this offense. See T. 2605. In its "Findings, Conclusions, Sentence and Order," the trial court imposed the death penalty upon petitioner because "[t]he evidence in the case, and as found by the jury discloses a brutal, conscienceless, torture, rape and deliberate killing of a human being," and because "of the rape torture, kidnapping and killing of Lana Harding of which the defendant has been found guilty," Ct. File Item 169, at pp. 7,8; Appendix B, infra (emphasis added). Second, the trial court asserted that "under existing Montana Statutes the defendant under a 100 year imprisonment sentence would automatically be eligible for parole in 12 1/2 years less good time allowance [and] . . . the 12 1/2 years could and would be cut so that the defendant would only be required to service [sic] approximately seven years of the 100 year sentence before he would be turned loose." Id. at 9. This is simply

incorrect.[43]

Petitioner's submission here is not that the trial court was forbidden to make a finding of rape even though the jury had not made such a finding,[44] or that the trial judge was forbidden to evaluate the chances of petitioner's being paroled. But in his finding of rape, the trial judge relied on a jury finding which was never in fact made; and in his estimation of petitioner's chances for parole, the trial judge misunderstood the governing law. This Court should grant certiorari to consider the reliability of the fact-finding process afforded by Montana here, for just as in Gardner v. Florida, supra, it appears probable that petitioner's "death sentence rests on an erroneous factual predicate." Id. at 4278.

43/ The trial judge's assertion that petitioner "would be turned loose to menace society" after serving only seven years of a one hundred year sentence is erroneous. Under Mont. Rev. Codes Ann. §95-3214(1)(a)(1973 supp.), a prisoner is eligible for parole after "he has served at least one-quarte (1/4) of his full term, less good time allowances off, as provided in section 80-1905." Under the latter section, it would be impossible to accumulate more than 12 1/2 years, which would reduce the twenty-five years ("one quarter . . . of his full term")to 12 1/2 years. Furthermore, there is no guarantee that a prisoner who is eligible for parole at this point would be granted it.

44/ In affirming petitioner's death sentence, the Montana Supreme Court also relied on the trial judge's erroneous finding of rape, since it cited in support of its affirmance the trial judge's findings "(1) that the murder was committed in the commission of a felony; (2) [that there was] a sexual attack on the victim, and (3)[that] 'it was a brutal, conscienc less, torture rape and deliberate killing of a human being." State v. McKenzie, supra, 557 P.2d at 1034.

D. The Constitutional Excessiveness of Capital Punishment.

Petitioner respectfully urges reconsideration of Gregg v. Georgia, 428 U.S. 153, 169 (1976). See Black, Due Process for Death: Jurek v. Texas and Companion Cases, 26 CATH. U. L. REV. 1 (Fall, 1976).

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT'S RULING THAT PETITIONER MUST ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THROUGH THE INTRODUCTION OF PROOF OF "MENTAL DISEASE OR DEFECT" THAT HE DID NOT HAVE A PARTICULAR STATE OF MIND WHICH IS AN ESSENTIAL ELEMENT OF THE CRIME OF DELIBERATE HOMICIDE AND OF AGGRAVATED KIDNAPING VIOLATED PETITIONER'S RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO REQUIRE THE STATE TO PROVE BEYOND A REASONABLE DOUBT EVERY FACT NECESSARY TO CONSTITUTE THE CRIME CHARGED.

The trial court's instruction, given over petitioner's objection, Add. Instr. 53, Ct. File Item 154, that petitioner bore the burden of convincing the jury, by a preponderance of the evidence, that he did not have the "requisite mental state" for otherwise criminal acts it found him to have committed, violated petitioner's right to prosecutorial proof beyond a reasonable doubt of every fact necessary to constitute the crime charged, as recognized in In re Winship, 397 U.S. 358, 364 (1970).

At issue here is not the question whether the State may place upon a criminal defendant the burden of establishing the affirmative defense of insanity. Twenty-five years ago, the Court held, with Justice Frankfurter and Justice Black dissenting, that Oregon's requirement that a defendant bear the burden of proving insanity "beyond a reasonable doubt" did not violate the Due Process Clause. Leland v. Oregon, 343 U.S. 790 (1952). The Court has recently dismissed for want of a substantial federal question an appeal challenging on due process grounds Delaware's requirement that a defendant establish the "affirmative defense" of "mental illness or mental defect" by a preponderance of the evidence. Rivera v. Delaware, ____U.S.____, 50 L.Ed.2d 160 (1976).[45] See also Hicks v. Miranda, 422 U.S. 332 (1975).

45/ Delaware Criminal Code §401 (1973) provided:

Approximately half the jurisdictions in the country follow the Delaware rule, while the remainder require the State to prove sanity beyond a reasonable doubt once the defendant has introduced prima facie evidence of insanity.[46]

But under the Montana law governing criminal responsibility, evidence of "mental disease or defect excluding responsibility"[47] is admissible at a criminal trial for two quite separate purposes. First, it may be admitted to establish the "affirmative defense" of insanity, Mont. Rev. Codes Ann. §95-503(a) (1969).[48] Montana follows the Delaware rule and requires the defendant to establish this defense by a preponderance of the evidence. Second, such evidence may also be admitted "to prove that he [the defendant] did not have a particular state of mind which is an essential element of the offense charged," Mont. Rev. Codes Ann. §95-503(b)(2) (1969). Montana Revised Codes Annotated §95-502 (1969) explicitly provides:

> "Evidence of mental disease or defect admissible when relevant to element of the offense. Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense."

This dual use of "mental disease or defect" evidence is recognized throughout the Montana criminal code.[49] If the defendant establishes the "affirmative defense" of "mental disease or defect excluding responsibility", he is entitled to a verdict of "not guilty by reason of mental disease or defect."[50] If, however,

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45/Cont. "(1) In any prosecution for an offense, it is an affirmative defense that, at the time of the conduct charged, as a result of mental illness or mental defect, the accused lacked substantial capacity to appreciate the wrongfulness of his conduct or lacked sufficient will power to choose whether he would do the act or refrain from doing it.

(2) If the defendant prevails in establishing the affirmative defense provided in subsection (1) of this section, the trier of facts shall return a verdict of 'not guilty by reason of insanity.'"

46/ See Annot., 17 A.L.R.3d 146 (1968), and 1975 supp.

47/ Mont. Rev. Codes Ann. §95-501 (1969) provides:

"Mental disease or defect excluding responsibility. (a) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he is unable either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(b) As used in this chapter, the terms 'mental disease or defect' does not include an abnormality manifested only by [repeated] criminal or otherwise antisocial conduct."

48/ Sec. 95-503(a) provides that "[m]ental disease or defect excluding responsibility is an affirmative defense which the defendant must establish by a preponderance of the evidence."

49/ The dichotomy is explicitly recognized in Mont. Rev. Codes Ann. §95-503 (1969), which provides in subsec. (a) that "Mental disease or defect" is an "affirmative defense", and in subsec. (b)(2) that evidence of "mental disease or defect" may be introduced to prove that a defendant "did not have a particular state of mind which is an essential element of the offense charged." Mont. Rev. Codes Ann. §95-505(a)(1969) provides that the court may appoint a psychiatrist to examine a defendant either when "the defendant has filed a notice of intention to rely on the defense of mental disease or defect excluding responsibility" or when there is "reason to believe that mental disease or defect of the defendant will otherwise become an issue in the cause." The Montana criminal code requires two separate notices: one is to be filed in the event a defendant intends to rely upon "mental disease or defect excluding responsibility" as an affirmative defense, Mont. Rev. Codes Ann. §95-503(b)(1) (1969), and "[t]he defendant shall give similar notice when in a trial on the merits, he intends to rely on a mental disease or defect, to prove that he did not have a particular state of mind which is an essential element of the offense charged," Mont. Rev. Codes Ann. §95-503(2) (1969). The report of the court-appointed psychiatrist is to contain, inter alia, two separate evaluations:

> "When a notice of intention to rely on the defense of irresponsibility has been filed, an opinion as to the ability of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law at the time of the criminal conduct charged,"

Mont. Rev. Codes Ann. §95-505(c)(4) (1969), and

> "When directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged."

Mont. Rev. Codes Ann. §95-505(c)(5) (1969). When the court-appointed psychiatrist is called to testify at trial, he is permitted to testify concerning "the mental condition of the defendant at the time of the commission of the offense charged" and concerning the ability of the defendant "to have a particular state of mind which is an element of the offense charged." Mont. Rev. Codes Ann §95-507(d) (1969).

50/ This kind of acquittal normally results in the compulsory commitment of the defendant, see Mont. Rev. Codes Ann. §95-508 (1969).

the defendant establishes by psychiatric evidence the non-existence of one of the "elements of the offense" with which he is charged, he is entitled to a general verdict of "not guilty" of that offense (although he may, of course, be convicted of a lesser included offense which lacks that element). In both cases, however, the burden is placed upon the defendant rather than the State to establish the exculpatory result (either "mental disease or defect excluding responsibility" or the nonexistence of a specific element of the crime) by a preponderance of the evidence.

Petitioner was charged with "Deliberate Homicide," and the State was required to prove that he had committed a "criminal homicide" "purposely or knowingly." Mont. Rev. Codes Ann. §94-5-102(1)(a) (1976 Supp.).[51] The jury was instructed to this effect[52] and it was further told by the trial court that to find

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51/ A defendant is guilty of "criminal homicide" if he "purposely, knowingly or negligently causes the death of another human being." Mont. Rev. Codes Ann. §95-5-101(1)(1976 Supp.), and "criminal homicide" may be "deliberate homicide," "mitigated deliberate homicide", or "negligent homicide," Mont. Rev. Codes Ann. §94-5-101(2)(1976 Supp. Sec. 94-5-102(1) provides that "criminal homicide constitutes deliberate homicide if (a) it is committed purposely or knowingly or (b) [during the course of certain felonies]." Mont. Rev. Codes Ann. §94-2-101 (1976 Supp.) defines both "purposely" and "knowingly":

> "(28) 'Knowingly'--A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as 'knowing' or 'with knowledge' have the same meaning."
>
> "(53) 'Purposely'--A person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as 'purpose' and 'with the purpose' have the same meaning."

52/ "The offense of Deliberate Homicide requires that the voluntary act (the Killing) have been committed by the defendant either knowingly or purposely or that it was committed in the commission of a forcible felony." Prelim. Instr. 29-I, Ct. File Item 154.

petitioner guilty of "Deliberate Homicide by Means of Torture" (a capital offense unless the trial judge later found "mitigating circumstances") the jury would have to find a "voluntary act (the physical infliction of cruel suffering) . . . done purposely and in addition thereto that it was done for the particular purpose of enabling the assailant . . . to satisfy some . . . untoward propensity of the assailant."[53] However, the State's burden was lightened by a provision of the 1973 Montana Criminal Code that:

> "In a deliberate homicide [case], knowledge or purpose may be inferred from the fact that the accused committed a homicide and no circumstances of mitigation, excuse or justification appear."

Mont. Rev. Codes Ann. §95-3004(b)(1975 Supp.). See Add. Instr. 33-I Ct. File Item 154.[54]

The critical issue, from the inception of this criminal prosecution, was whether the State or petitioner had the responsibility of affirmatively proving (or disproving) that petitioner had "knowingly" or "purposely" killed or kidnaped Lana Harding. Petitioner repeatedly attacked the constitutionality of Mont. Rev. Codes Ann. §95-503(b)(2) (1969) and sought to require the

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52/ Cont.
Moreover, to convict petitioner of the potentially capital offense of "aggravated kidnaping," the jury had to find that "he either knowingly or purposely restrains another person by either secreting or holding him in a place of isolation or by using or threaten to use physical force to hold said person for any of the following particular purposes:
(a) to facilitate the commission of any felony, or
(b) to inflict bodily injury on the victim, or
(c) to terrorize the victim." Prelim. Instr. 25, Ct. File Item 154.

53/ "The offense of Deliberate Homicide by Means of Torture requires that the voluntary act [the physical infliction of cruel suffering) be done purposely and in addition thereto that it was done for the particular purpose of enabling the assailant either:
(a) to extort something from the person assailed; or
(b) to persuade the assailed against his or her will; or
(c) to satisfy some other untoward propensity of the assailant." Prelim. Instr. 29-II, Ct. File Item 154.

54/ "Proof of Mental State by Inference. If you find from the evidence beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, in the commission of a voluntary act, caused the death of Lana Harding, you are permitted from that fact alone to deduce or reason that he did so either knowingly or purposely, if no circumstances of mitigation, excuse or justification appear in the evidence." Add. Instr. 33-I, Ct. File Item 154.

State to prove affirmatively a "knowing" or "purposeful" homicide.

On June 8, 1974, petitioner filed a pre-trial "Notice" which stated:

> "This is to advise the Court and the attorneys for the State of Montana in the above entitled and captioned cause, that the defendant intends to require the State of Montana to prove, beyond a reasonable doubt, that defendant had, and could have had, a particular state of mind which is an essential element of each offense charged in the Information on file herein.
>
> "Please further be advised that if necessary, at trial, it is defendant's present intention to introduce evidence and testimony, expert or otherwise, to refute any such proof.
>
> "This advise to the Court and to the attorneys for the State of Montana is not, repeat not, an attempt to give notice pursuant to Section 95-1803(d) or Chapter 5 of Title 95, R.C.M. 1947, and should not be so construed; and further defendant reserves, and does not intend to waive, any and all objections heretofore and hereinafter made concerning said statutes."

Ct. File Item 40 (emphasis in original). The trial judge treated this "Notice" as a notification by petitioner both that he would seek to establish the affirmative defense of insanity and that he would introduce evidence of "mental disease or defect" as negating the element of "knowingness" or "purposefulness" and therefore ordered petitioner examined by a psychiatrist to determine "the capacity of the defendant to have a particular state of mind which is an element of the offenses charged." Ct. File Item 75 (attached infra as Appendix C).[55]

55/ On October 2, 1974, petitioner filed a "Motion to Reconsider" the ruling ordering petitioner to be examined by a State psychiatrist; petitioner denied he was giving notice of intent to rely upon the affirmative defense of "mental disease or defect." Ct. File Item 77. This "Motion" was denied on October 4. Ct. File Item 80.

On December 2, 1974, petitioner filed a "Motion to Suppress" the report of the psychiatric examination which also requested "an Order of this Honorable Court advising and requiring the State of Montana that it has the burden of proof, at trial, to prove beyond a reasonable doubt, that defendant had and could have had the requisite state of mind which are [sic] elements of the various crimes charged herein." Ct. File Item 88. This motion was denied on December 3, 1974. Ct. File Item 90.

During its case-in-chief, the State made no effort to prove that petitioner had committed a homicide or kidnaping "knowingly" or "purposely". Petitioner sought to require such proof by filing a "Motion for Bifurcated Trial,"[56] a "Motion for Dismissal,"[57] and a "Motion to Require Proof of Ability to Have

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56/ This motion alleged:

> "That the State has made no effort, and will apparently make no effort, in their case-in-chief, to prove Defendant's ability to have, or to have had, a particular state of mind which is an essential element of each and every offense charged in the Information against him;
>
> . . . . That the Court has . . . advised the Defendant that it will require proof from the Defendant, by a preponderance of the evidence, that he did not have such particular state of mind as aforesaid . . .;
>
> . . . . [And that this ruling] violate[d] his due process . . . rights to only be convicted upon proof beyond a reasonable doubt that was presented by the State (See In Re Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068)."

Ct. File Item 134.

57/ This motion alleged that the court should "require of the State that it carries its burden of proof beyond reasonable doubt as to the existence of the requisite mental state or condition at the time of the alleged commission of offenses by this Defendant." Ct. File Item 135.

a Particular Mental State."[58] These motions were denied, T. 1371; T. 1372; T.2208, and at the conclusion of the State's case, petitioner again moved to dismiss on the ground that "[t]he State has failed to present sufficient evidence to go to the Jury in that it has... [f]ailed to prove the Defendant had, or could have had, a particular state of mind which is an essential element of each offense charged in the Information on file herein." Ct.File Item 144. This motion was also denied. T. 2208

58/ In its entirety, this motion alleged:

> "That the State is about to close its case-in-chief in this cause;
>
> That the Defendant has previously served notice upon the State and the Court that Defendant intends to require the State to prove, beyond a reasonable doubt, that Defendant had, and could have had a particular state of mind which is an essential element of each offense charged in the Information;
>
> "That the Court has by its Order of September 30, 1974, raised the issue of whether the Defendant had, or could have had, a particular state of mind which is an essential element of each offense charged in the Information;
>
> "That this issue has again been raised at trial by the State within the Information itself and the evidence and testimony presented; and by the Defendant through cross-examination of the State's witnesses, and this Motion;
>
> "WHEREFORE, the Defendant moves the Court to require the State to prove, beyond a reasonable doubt, that the Defendant had, and was capable of having, particular states of mind which are essential elements of each offense charged in the Information on file herein, before the State closes its case-in-chief; and if the State fails to make such proof that the Court either dismiss each and every Count and allegation now being tried against Defendant, or in the alternative, that the Court direct the Jury to bring in a Not Guilty verdict to each and every Count and allegation now being tried herein against Defendant."

Ct. File Item 143.

Dr. Robert A. Wetzler, a psychiatrist, testified that petitioner, because of a "personality trait disturbance -- schizoid type," T. 516, was unable either to act "knowingly," T. 549, or intentionally and purposively, T. 567, T. 2320. Expert witnesses for the State testified in rebuttal that while petitioner suffered from a "passive-aggressive personality, social maladjustment, excessive drinking and other drug dependency," T. 2396, he was able to "have a state of mind that could be an element of the offence charged," T. 2398. See T. 2417-2419, 2434, 2538.[59]

The trial court rejected petitioner's proposed instructions that would have required the State to prove affirmatively that petitioner had "knowingly" or "purposely" committed a homicide.[60]

59/ During jury selection, petitioner sought to examine the veniremen concerning their views on mental responsibility, see, e.g., T. 184, and "to voir dire this jury as it relates to the question of intent," T. 200, but the court refused to permit such a voir dire, T. 197. The trial court ruled that "[t]he man is presumed to be sane and the burden is on him. That is just to prove by a preponderance of the evidence that he couldn't have had the requisite mental intent. The burden starts on him." T.199.

60/ The trial court declined to give the following instructions submitted by petitioner:

> "In each Count, or part of a Count, requiring proof of 'knowingly' or 'purposely', the State must prove that Defendant had the necessary state of mind to have acted, and was capable of acting, either 'knowingly' or 'purposely' beyond a reasonable doubt.
>
> In each Count, or portion of a Count, requiring such, the State must prove beyond a reasonable doubt, that Defendant had the necessary state of mind to have acted either 'knowingly' or 'purposely'. If you find that you do not believe, beyond a reasonable doubt, that Defendant had, or could have had, such a state of mind you must find him Not Guilty." (Defendant's No. 13, Ct. File Item 153.)
>
> "[You must find] that the State has proved beyond a reasonable doubt each essential element of the offense. Two of these elements are the requirements of purposely or knowingly . . . [committing homicide] on which you have already been instructed. In determining whether those requirements have been proved beyond a reasonable doubt you may consider the testimony as to the defendant's abnormal mental condition.

The trial judge instead instructed that petitioner was to be presumed innocent and the State was required to prove his guilt beyond a reasonable doubt.[61] Prelim. Instr. 7, Ct. File Item 154. It instructed, however, that upon petitioner's plea of "not guilty" he was "presumed to have been free from any disease or defect of the mind which excludes responsibility for his conduct at the time the offenses are alleged to have been committed and to be sane now." Add. Instr. 30, Ct. File Item 154. The court instructed

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60/ cont'd.

> If you find that the State has failed to prove beyond a reasonable doubt any one or more of the essential elements of the offense, you must find the defendant not guilty, and you should not consider any possible verdict relating to mental disease or defect excluding responsibility." Defendant's No. 47, Ct. File Item 153.

61/ These abstract (albeit correct) instructions on beyond-a-reasonable-doubt proof are inadequate to correct the more specific requirements of Additional Instruction 53, discussed infra, which shifted the burden to petitioner to prove that he had not acted "purposely" or "knowingly". It will be recalled that in Mullaney v. Wilbur, 421 U.S. 684 (1975), the Maine trial court had given an instruction that the State bore the burden of proving "express malice" to establish the offense of murder. 421 U.S. at 686 n.4. However, the trial court had also instructed that malice would be implied unless the defendant established that he had acted in the heat of passion, and it was the latter instruction that this Court found to violate the Due Process Clause.

that "[m]ental disease or defect excluding responsibility for criminal conduct" is an affirmative defense which must be proved by the defense by a preponderance of the evidence Add. Instr. 53, Ct. File Item 154, and submitted to the jury a proposed "not guilty by reason of insanity" verdict form for it to consider, Add. Instr. 54, Ct. File Item 154, but it also charged, in the "Mental Disease or Defect" instruction that this same production and persuasion burden rested on the petitioner on the issue of "whether or not he could have had the requisite mental state for the act or acts which you have found he committed," Add. Instr. 53, Ct. File Item 154. If the jury found beyond a reasonable doubt that "the defendant did do the act or any of the acts charged against him", without regard to what his mental state was:

> "you are expressly directed by the law to deduce or reason that at the time of such conduct he was able to appreciate the criminality of his conduct and to conform his conduct to the requirements of law.
>
> To overcome this express direction of the law the defendant must prove by a preponderance of the evidence that he suffered from such an abnormality or subnormality of the mind at the time of such conduct that the jury cannot say that it does not have a reasonable doubt as to his responsibility for such conduct."

Ibid.

The 1973 Montana Criminal Code has substantially redefined the common-law definition of homicide, and this redefinition compounded with Montana's new rules governing "mental disease or defect" evidence forced petitioner to "bear the laboring oar: Mullaney v. Wilbur, 421 U.S. 684, 706 (1975) (concurring opinion of Mr. Justice Rehnquist), on the key mental elements of "deliberate homicide." Once the prosecution proves the fact of an unlawful killing, it is entitled to both an "inference", Add. Instr. 32, 34, Ct. File Item 154, and a "presumption", Add. Instr. 53, Ct. File Item 154, that the relevant mental element ("purposiveness" or "knowingness") exists,[62] and the defendant is forced to disprove the inferred element by proof by a preponderance of the evidence that the element does not exist. The new Montana rules do not simply fail to require the State to prove the sanity of the defendant once this becomes a question of fact, see Leland v. Oregon, supra; Davis v. United States, 160 U.S. 469 (1895); they have placed upon the defendant the burden of disproving the mental elements in the offenses of "deliberate homicide" and "aggravated kidnaping." These rules "denigrat[e] the interests found critical in Winship," Mullaney v. Wilbur, supra, 421 U.S. at 698, and since "Winship is concerned with substance rather than... formalism," id. at 699, the Court should grant certiorari here.[63]

62/ Cf. Leland v. Oregon, supra, 343 U.S. at 802-803 (dissenting opinion of Justice Frankfurter):

> "But a muscular contraction resulting in a homicide does not constitute murder. Even though a person be the immediate occasion of another's death, he is not a deodand to be forfeited like a thing in the medieval law. Behind a muscular contraction resulting in another's death there must be culpability to turn homicide into murder."

63/ Although the Court is currently considering whether Mullaney v. Wilbur, supra, is retroactive, Hankerson v. North Carolina, No.76-6568 the retroactivity of In re Winship, supra, is already established. See Ivan v. City of New York, 407 U.S. 203 (1972).

III

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT'S RULING THAT PETITIONER MUST ESTABLISH THE AFFIRMATIVE DEFENSE OF "NOT GUILTY BY REASON OF A MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY" VIOLATED PETITIONER'S RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO REQUIRE THE STATE TO PROVE BEYOND A REASONABLE DOUBT EVERY FACT NECESSARY TO CONSTITUTE THE CRIME CHARGED.

The trial court instructed, over petitioner's objection, Add. Instr. 53, Ct. File Item 154, that petitioner bore the burden of establishing by a preponderance of the evidence, the affirmative defense of "not guilty by reason of a mental disease or defect excluding responsibility," Add. Instr. 54, Ct. File Item 154. Petitioner respectfully urges the Court to reconsider its rulings in Leland v. Oregon, 343 U.S. 790 (1952) and Rivera v. Delaware, ___U.S.___, 50 L.Ed.2nd 160 (1976), and to consider after full briefing and argument whether Montana's rule regarding the burden of proof of the insanity defense violates a criminal defendant's constitutional right to be convicted only upon proof beyond a reasonable doubt "[g]iven the transparent erosion of Leland by Winship [In re Winship, 397 U.S. 358 (1970)] and Mullaney [Mullaney v. Wilbur, 421 U.S. 684 (1975)]." Rivera v. Delaware, supra, 50 L.Ed.2d at 161 (dissenting opinion of Mr. Justice Brennan).

IV.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FAILURE OF THE COURTS BELOW TO ENFORCE A PLEA BARGAINING AGREEMENT BETWEEN PETITIONER, THE STATE, AND THE TRIAL COURT, WHICH PETITIONER'S COUNSEL HAD RELIED UPON IN REVEALING TO THE STATE PRIOR TO TRIAL PETITIONER'S TRIAL STRATEGY AND TACTICS, DEPRIVED PETITIONER OF DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This Court has recognized that "[t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely call 'plea bargaining', is an essential component of the administration of justice, Santobello v. New York, 404 U.S. 257, 260 (1971). See also Blackledge v. Allison, 45 U.S.L.W. 4435, 4437 (U.S., May 2, 1977). As a "phase in the process of criminal justice," plea bargaining "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances," Santobello v. New York, supra, 404 U.S. at 262. This case presents an instance where these "safeguards" broke down, and petitioner was prejudiced by unfair plea bargaining practices. Like Blackledge v. Allison, supra, petitioner's case presents a significant question of the fairness of plea bargaining procedures which should be resolved by this Court.

Petitioner was tried, convicted and sentenced to death after the county attorney who prosecuted him and the judge who heard his case had agreed to permit him to plead guilty to deliberate homicide and aggravated assault and to receive a sentence of imprisonment -- and after his counsel, in

reliance on that agreement, had revealed to the State the substance of his planned defense.[64] In a meeting on December 22, 1974, defense counsel, County Attorney Nelson, and Special Prosecutor Douglas Anderson agreed that petitioner would plead guilty to two charges (deliberate homicide and aggravated assault) and receive sentences of 50 and 20 years, respectively, on those counts. Affidavit of Barney Reagan, Esq., Ct. File Item 99, at p. 2. On December 23, 1974, that agreement was presented to the trial judge, R. J. Nelson, during a three hour meeting in chambers. Id. at 3. Judge Nelson agreed to accept the proposed pleas, after a slight modification in sentence (which was agreed to by all parties). Ibid. The trial court set December 30, 1974, for the entry of guilty pleas pursuant to the agreement. Id. at 4. Also pursuant to that understanding, counsel for both sides held a further meeting on December 23, at which the defense presented to the prosecution the tactics it envisioned using at trial and the weaknesses it saw in the State's case, in order to assist the prosecutors in explaining and justifying the plea agreement to the Sheriff's office, the victim's family and the public.[65] Ibid.

64/ The evidence on this matter which appears in the record consists of defense counsel's affidavits and statements to the trial court, and the trial judge's responses. Other than in its Brief in the Montana Supreme Court -- where it "agree[d] with the basic factual description of the events" given by defense counsel, State v. McKenzie, supra, 557 P.2d at 1038, see Brief of the State of Montana v. McKenzie, Mont. Sup. Ct. No. 13011, at pp. 17-21 -- there has never been any response to these claims by counsel for the State of Montana. In its Brief, the State acknowledged that information concerning the defense's trial tactics had been revealed, but denied that it had been "requested", and said that it all "was either already known to the prosecution or of no significance to the prosecution's case." Brief of the State, supra, at pp. 20, 21.

65/ The weaknesses the defense foresaw were due primarily to the manner in which the investigation had been conducted; the defense had concluded that some of the evidence obtained and the evidence collected would be inadmissable at trial. Ibid. See note 13 supra.

On December 28, 1974, counsel for the State advised defense counsel that they were abrogating the plea agreement because of objections voiced by Ms. Harding's family. Ibid.[66] On December 30, 1974, the parties nonetheless appeared at the hearing that had been set for entry of the pleas. T. 1-6 (Dec. 30, 1974). Defense counsel advised the court that "the prosecution does not wish to proceed with the agreement and understanding that we reached here, with this court, on the 23rd day of December, 1974" T. 5 (Dec. 30, 1974); and see id. at 3-6, 12-16, and expressed petitioner's willingness "to go ahead with that [December 23] agreement and understanding reached." Ibid. The court responded that "if [the prosecutors] . . . don't want to go throught with plea bargaining, I don't suppose they have to," and asked County Attorney Nelson, "Do you want to proceed the way that you agreed with counsel last Monday, the 23rd of December . . . ?" Ibid. The prosecutor responded that he did not, and the court -- without any further evidentiary inquiry[67] -- announced that the case would go to trial.

66/ In his Reply Brief in the Montana Supreme Court, petitioner's counsel contended that he was told by the prosecutors that Ms. Harding's family did more than "object:" her father "threatened to kill the prosecutors if they went through with the bargain." Reply Brief of Appellant, State of Montana v. McKenzie, Mont. Sup. Ct. No. 13011, at p. 12.

67/ The court did permit defense counsel to state for the record what had transpired with regard to the plea agreement, over the prosecutor's objection that he didn't "feel that we should make references to all of this." T. 14 (Dec. 30, 1974). Defense counsel summarized the plea negotiations and stated that petitioner had agreed to plead guilty in exchange for a sentence of imprisonment, that this arrangement had been accepted by the prosecution and the court (ibid.), and that the defense in reliance on this agreement had informed the prosecution of its trial strategy and tactics and of the weaknesses it perceived in the State's case (id. at 15). The prosecutor did not respond to or contest any of the representations, or those made in defense counsel's affidavit filed later that day. Affidavit of Barney Reagan, Esq., Ct. File Item 99.

On December 30, a defense motion for substitution of the trial judge based on the possibility of prejudice stemming from the court's involvement in plea negatiations, Ct. File Item 94, was denied. T. 24 (Dec. 30, 1974). On January 3

On the opening day of trial, the State was allowed to endorse fifty-eight more witnesses, Ct. File Item 113, many of who testified to the chain of custody of various evidentiary items. T. 80-81, 88.[68] Petitioner's objected to the endorsement of these witnesses on the ground that the State had discovered the need for many of these witnesses only after the defense had revealed its planned trial tactics pursuant to the plea agreement, but the objection was overruled. T. 91; Ct. File Item 114. The Montana Supreme Court affirmed the trial court's ruling, holding that the State's claimed "intent to get the reaction of the victim's parents and the sheriff" kept the agreement from being final and enforceable. State v. McKenzie, supra, 557 P.2d at 1038, -- regardless of the approval given to it by the trial judge and the reliance placed on it by defense counsel.

In Santobello v. New York, supra, this Court ruled squarely that due process requires that "when a plea rests in any significant degree on a promise or agreement of the prosecutor . . . such promise must be fulfilled." 404 U.S. at 262. In petitioner's case, no plea was accepted by the trial court, but petitioner nevertheless made a "waiver of [his] constitutional rights" in consideration of the bargain almost as serious as that "implicit in [a guilty] plea." 404 U.S. 268 (concurring and dissenting opinion of Mr. Justice Marshall). By revealing to the prosecution

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67/ cont'd.- 1975, a "Motion to Enforce Agreement of December 23, 1974," was filed by the defense, again setting out the facts surrounding the plea agreement, Ct. File Item 104, and this motion was denied that same day, Ct. File Item 105. When, at trial, the State moved to endorse fifty-eight more witnesses -- many of whom were to testify to matters as to which the defense had advised the State its case was weak -- the defense objected,claiming prejudice on account of the abrogated plea agreement, but the objection was overruled. T. 80-96; Ct. File Items 114, 115. Finally, at the close of trial, the defense filed a "Petition and Motion in Mitigation", Ct. File Item 163, a Motion for a New Trial, Ct. File Item 163, based, in part, on the same grounds, but this motion was summarily denied by the trial court.

68/ See note 13 supra.

the strategies the defense had planned for trial, petitioner, through his counsel, opened to the State the "priviledged area" in which his attorney had analyzed and prepared his case. United States v. Nobles, 422 U.S. 225, 238 (1975). He abandoned his right "to remain silent unless he [chose] to speak in the unfettered exercise of his own will," Malloy v. Hogan, 378 U.S. 1, 8 (1964), and to force the prosecution to "'to shoulder the entire load,'" Miranda v. Arizona, 384 U.S. 436, 460 (1966), "to prove its case without any assistance of any kind from the defendant himself." Williams v. Florida, 399 U.S. 78, 108 (1970) (dissenting opinion of Justice Black).

While a criminal defendant may have no absolute right to have his guilty plea accepted by a court, Lynch v. Overholser, 368 U.S. 705, 719 (1962), surely if a defendant has been prejudiced by fulfilling the conditions precedent to a plea bargaining agreement, the prosecutor's subsequent unilateral abrogation of that agreement violates fundamental fairness.[69/] The justifications offered for the State's breach of its agreement here provide no adequate basis for departure from Santobello's rule of fairness. Whether it was in fact "always [the State's] . . . intent to get the

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69/ The lower federal courts have held that while the binding nature of a plea agreement may be "a matter of state law . . . where . . . there is no showing that the accused was prejudiced in preparing his defense," Sanchell v. Parratt, 530 F.2d 286, 291 n.3 (CA8 1970), where a defendant "to his prejudice, performed his part of the agreement while the Government did not," United States v. Paiva, 294 F. Supp. 742, 747 (DDC 1969), due process requires that the bargain be enforced. See United States v. Carter, 454 F.2d 426 (CA4 1972). See also State v. Davis, 188 So.2d 24 (Fla. 1966); Butler v. State, 228 So.2d 421 (Fla. App. 1969); State v. Kuchenreuther, 218 S.W.2d 621 (Iowa 1974); State v. Brockman, 277 Md. 687, 357 A.2d 76 (1976); People v. Reagan, 397 Mich. 306, 235 N.W.2d 581 (1975); People v. Shipp, 68 Mich. App. 452, 243 N.W.2d 18 (1976).

reaction of the victim's parents and the sheriff before . . . [the] bargain would be completed," or whether the prosecutor changed his mind about the bargain because of the vehemence with which those parties objected,[70/] the result is the same. "That the breach of the agreement was inadvertent does not lessen its impact." Santobello v. New York, supra, 404 U.S. at 262.

"Prosecutorial duties affecting the fairness of trials have never been . . . restricted" "to good faith effort." Correale v. United States, 497 F.2d 944, 947 (CA1 1973). The "meticulous standards of both promise and performance [required by the Constitution from] . . . prosecutors engaging in plea bargaining," ibid., are not met by permiting the State to back out of a bargain which is relied upon by the defense to its prejudice, merely because the prosecuting attorney may have had a subjective intent to make the bargain conditional. Certiorari should be granted here to consider whether the State gained a fundamentally unfair advantage, see Wardius v. Oregon, 412 U.S. 470 (1973), by abrogating its plea agreement in this capital case,[71/] and whether this is a situation where "once a

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70/ In other contexts, the Court has warned that a criminal defendant may be deprived of due process by "prejudicial influences outside the courtroom," Shepard v. Florida, 341 U.S. 50, 51 (1951) (concurring opinion of Justice Jackson); cf. ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION § 3.9(c) (prop. draft. 1971). In Gregg v. Georgia, supra, the Court emphasized that capital sentencing proceedings should contain safeguards against "passion or prejudice," that "it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts," 428 U.S. at 225 (opinion of Mr. Justice White), and that the prosecutor's decision whether to seek a capital felony conviction "will be the same as those by which the jury will decide the questions of guilt and sentence," ibid.

71/ A prosecutor's decision to plea bargain in a capital case is "probably the most widely significant choice separating the doomed from those who . . . go to prison." BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 43 (1974).

defendant has carried out his part of the bargain the Government must fulfill its part." United States v. Hallam, 472 F.2d 168, 169 (CA9 1973).

V.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE INTRODUCTION AT TRIAL OF EVIDENCE FROM PETITIONER'S DWELLING PLACE AND TRUCK PARKED OUTSIDE HIS DWELLING PLACE PURSUANT TO A SEARCH WARRANT VIOLATED HIS RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES TO BE FREE FROM SEARCHES AND SEIZURES UNDER WARRANTS WHICH ARE NOT BASED ON PROBABLE CAUSE AND WHICH DO NOT "PARTICULARLY DESCRIB[E] THE . . . THINGS TO BE SEIZED?"

This case presents for review two important and recurrent Fourth Amendment issues: the circumstances under which probable cause to arrest may furnish probable cause to search a dwelling, and the permissibility of seizures pursuant to a warrant of undescribed items which are not patently "contraband" or evidence of criminal conduct.

The relevant facts may be quickly limned. At about 6:00 p.m. on January 22, 1974, the day Ms. Lana Harding's disappearance was reported, Pondera County Attorney David Nelson requested Justice of the Peace Robert Wolfe to issue warrants for the arrest of petitioner (on a charge of assault) and for the search of "[t]he residence of [petitioner] and the surrounding curtiledge [sic] area known as the old Frank Jochem residence."[72] The County Attorney presented in

72/ The Complaint (filed by County Attorney Nelson charging petitioner with assault), the Warrant of Arrest (issued by Justice of the Peace Wolfe for assault), the affidavit of County Attorney Nelson in support of the issuance of a search warrant, the Search Warrant, and the Sheriff's Return on the search warrant, all contained in Ct. File Item 76, are reproduced in Appendix D, infra.

support of these requests his own affidavit and the sworn, unrecorded testimony of Deputy Sheriff Jerry Hoover. This affidavit stated that Lana Harding "is missing and may have been the victim of foul play;" that there was evidence of "scuffling" in the teacherage where she resided; that a tennis shoe, a trail "of an obejct being dragged from the teacherage," and "a woman's watch and blood stains" were found outside the teacherage; that the watch and blood stains were found "in the same area as the pickup truck driven by [petitioner] . . . [which was] observed on the evening of January 21, 1974, at approximately 8:00 to 8:30 o'clock P.M."; that the previous evening petitioner had come to the house of one Dan Pearson who "resides next to the teacherage directly north of the [petitioner's] residence" and had appeared "highly nervous and excited" and had requested Pearson's assistance in getting his truck started; and that Pearson had assisted petitioner to get his truck started, whereupon petitioner drove off in a easterly direction. Ct. File Item 76; Appendix D, infra. Deputy Hoover told the Justice[73] that at the teacherage he had "observed the eyeglasses on the floor in the bedroom and the throw rugs pushed up together against each other, and then the scuff marks on the floor, . . . [and a] tennis shoe being outside on the porch and the drag trail, and the blood on the road and the watch." Ct. File Item 30, at p.6. The deputy, who had interviewed Dan Pearson, also told the Justice of petitioner's appearing at Pearson's house on the

73/ Although Deputy Hoover's January 22, 1974, testimony before the Justice of the Peace was not transcribed, he gave a deposition on March 12, 1974, in the presence of counsel for petitioner and the State, which summarized his earlier testimony. This deposition appears in the record below as Ct. File Item 30.

previous night ""he [petitioner] had ran a long ways, and . . . he talked very rapidly and seemed awfully nervous," id. at 7) and of Pearson's helping petitioner start his pickup truck "in the approximate location of the blood and watch on the road there." Ibid. Hoover's oral testimony did not differ in any significant respect from the information contained in the Nelson affidavit.[74/]

On the basis of this evidence, Justice of the Peace Wolfe issued a warrant for petitioner's arrest on a charge of assault and a search warrant[75/] for petitioner's dwelling

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74/ The Montana Supreme Court stated that in support of the issuance of the search warrant "there was sworn testimony by the county attorney and deputy sheriff in addition to the affidavit and the combination thereof established probable cause." State v. McKenzie, supra, 557 P.2d at 1035. The record does not reveal what this "sworn testimony by the county attorney" was, apart from the affidavit filed by County Attorney Nelson. Justice of the Peace Wolfe stated that at the beginning of the proceedings on January 22, 1974, "Mr. Nelson explained the situation and related the happenings at that time, and I then swore Mr. Hoover in as to him telling the truth," Deposition of Justice of the Peace Robert O. Wolfe, Ct. File Item 30, at p. 4, but Justice Wolfe also stated, "there . . . [was no] other testimony or information brought to . . . [my] attention that was not included in the sworn statement of Mr. Jerry Hoover, the Deputy Sheriff, or in this affidavit [of County Attorney Nelson], id. at 9, and that "[b]ased upon the testimony of Mr. Hoover and this affidavit, . . .I issued a . . . Search Warrant," ibid. Insofar as the Montana Supreme Court has relied upon unrecorded testimony as a basis for issuing the search warrant, a significant Fourth Amendment question is presented "whether the Constitution requires that, at or before the time a warrant issues, the judicial officer make a permanent record of the evidentiary basis for its issuance," Christofferson v. Washington, 393 U.S. 1090 (1969) (opinion of Mr. Justice Brennan, dissenting from denial of certiorari).

75/ The County Attorney's request for a warrant to search had recited that:

> "the said Affiant, hereby prays for the issuance of a Search Warrant for the search of the said Defendant, DUNCAN MC KENZIE, residence located in the Southwest Quarter Northwest Quarter of Section Nine (9), Township Twenty-nine (29) North, Range Two (2) West, and the surrounding buildings within the curtlidge [sic], and for a search of a 1950 black Dodge pickup driven by the Defendant on the night of January 21, 1974. That the object of the search would be to seize the instruments of the assault of the said LANA HARDING including, but not limited to, the

and pickup truck to seize three described items of petitioner's clothing, five described items of women's clothing, and "any other controband [sic] articles." Ct. File Item 76; Appendix D, infra. The warrant concluded "that there is probable cause to believe that the property described is in or upon the said described real property and 1950 black Dodge pickup." Ibid.

The Sheriff executed these warrants[76/] at about 7:30 p.m. that evening. He went to petitioner's residence, told petitioner of Ms. Harding's disappearance, gave petitioner the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), and described the arrest and search warrants while petitioner was standing outside his house. Ct. File Item 30, Deposition of Sheriff Hammermeister at 52-55. He next put petitioner into the patrol car, "served the Search Warrant

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75/ cont'd.

> evidence as the whereabouts of the said LANA HARDING, to-wit: a brown long sleeve shirt, jeans and rubber overshoe boots, worn by the Defendant; and black coat, purple sweater, woman's blouse with flower design, woman's pink slacks and woman's red and white striped tennis shoe, and any other controband [sic] articles."

Ct. File Item 76; Appendix D, infra.

76/ Neither the State nor the courts below ever sought to justify the search of petitioner's dwelling and pickup as either a consent search or as a search incident to a lawful arrest. See Brief of the State, State v. McKenzie, Mont. Sup. Ct. No. 13011, at p. 15; Order Denying Motion to Suppress (Dec. 3, 1974), Ct. File Item 90; State v. McKenzie, supra, P.2d at 1034-1036. The "plain view" exception is similarly not applicable to the items seized, since without scientific analysis, it was not apparent that these items were evidence. See note 81 infra.

and then we started searching." Id. at 55. A thorough search of petitioner's pickup and dwelling was conducted by the Sheriff's deputies, and the Sheriff's Return noted the seizure of 10 items of clothing, a "pen and jack knife," "Pubic hairs of Suspect," "head hairs of suspect," and "1. pickup and complete contents." Ct. File Item 76; Appendix D, infra. Of these items, only two (the overshoes and the "blue jean type pants") had been described in the warrant. Two of the undescribed seized items were later introduced at petitioner's trial, with devastating effect. 77/

Assuming that there was probable cause for a warrant to arrest petitioner for assault on January 22, 1974, nothing presented to the issuing magistrate furnished probable cause to search petitioner's dwelling or truck. The Montana Supreme Court's decision that once "'a probability of criminal conduct . . . [is] shown'", State v. McKenzie, supra, 557 P.2d at 1034 (emphasis omitted), a warrant for the search of a suspect's dwelling is justified clearly presents a significant question for review. For nothing indicated that any evidence of Ms. Harding's disappearance was to be found within petitioner's dwelling. The magistrate apparently reasoned that because he found probable cause to believe petitioner assaulted her, there was probable cause to believe that evidence of his crime would be found in petitioner's dwelling. Such an inference flies in

77/ These two items were a pair of "red wing boots", T. 1062, and a "plaid jacket," T. 2090-2091. The boots were one of the most damning items of evidence which the State introduced, since an expert testified that their soles matched the prints found inside a pair of overshoes, T. 1061-1062, found abandoned near where Ms. Harding's purse was found. These abandoned overshoes had blood and brain tissue on them similar to samples taken from Ms. Harding's body, T. 2140, 2147.

the face of the Fourth Amendment's historic definition of "probable cause" as meaning reasonable grounds to believe that criminally-related objects are in the place to be searched at the time when the search is authorized to be conducted. The facts presented to the magistrate to authorize issuance of a warrant to search a dwelling "must be facts so closely related in time to the issue of the warrant as to justify a finding of probable cause at that time." Sgro v. United States, 287 U.S. 206, 210 (1932). While "only the probability . . of criminal activity is the standard of probable cause" for a search warrant, Spinelli v. United States, 393 U.S. 410, 419 (1969), the officers must demonstrate a connection between this criminal activity and "the premises to be searched", Dumera v. United States, 268 U.S. 435, 441 (1928). What must appear is "'reasonable or probable cause' to believe that [the searching officers] . . . will find the instrumentality of a crime or evidence pertaining to a crime" in the search, Dyke v. Taylor Implement Co., 391 U.S. 216, 228 (1968). 78/ As this Court has recognized, grounds to arrest do not "necessarily provide the basis for a search of the arrestee's house."

78/ See Lowery v. United States, 161 F.2d 30, 33 (CA2 1947):

> "probable cause for the issuance of a search warrant necessarily implies, not simply that there are reasonable grounds to believe that some violation of law exists, but that there is a violation in respect to some property located on some premises or on some person -- each of which can be unmistakably identified, so as to be capable of being particularly described in the warrant, from the information in the affidavit."

Vale v. Louisiana, 399 U.S. 30, 40 (1970).[79]

Moreover, even the search warrant that Justice Wolfe issued did not justify the seizure of the many non-contraband items which the officers picked up during their search. The Fourth Amendment's prohibition of warrants not "particularly describing the . . . things to be seized," is directed in "Precise and Clear" language against "the unbridled authority of a general warrant." Stanford v. Texas, 379 U.S. 476, 481 (1965). A more general warrant than that issued in this case can hardly be conceived. The warrant authorized the seizure of "any . . . controband [sic] articles." This warrant authorized the searching officers to seize whatever they thought might be relevant as evidence. Justice Wolfe stated that the "contraband" catch-all was intended to allow the seizure of any evidence "[t]hat the Sheriff felt was pertinent in his investigation and also pertinent to this specific search" and that it authorized him "to take anything he wanted to take that he thought might be related to this case." Deposition of Justice Wolfe, Ct. File Item 30, at p. 17. The Sheriff testified that "the wording [of the warrant] says 'and any other contraband' and I figured that

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79/ See United States v. Lucarz, 430 F.2d 1051, 1055 (CA9 1970):

> "[O]f course it cannot follow in all cases, simply from the existence of probable cause to believe a suspect guilty, that there is also probable cause to search his residence. If that were so, there would be no reason to distinguish search warrants from arrest warrants and cases like Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), would make little sense."

See also United States v. Bailey, 458 F.2d 408 (CA9 1972); United States v. Spearman, 532 F. 2d 133 (CA9 1976).

covered what we took in the way of evidence and items that we took." Deposition of Sheriff Hammermeister, Ct. File Item 30, at p.73.[80] The items seized by the officers were not "contraband" in any meaningful sense of the term:[81] they were simply items of clothing that caught the eye of the searching party. The Sheriff was "not certain what contraband means, but I felt it was evidence." Id. at 68.

This general rummaging search violated the cardinal Fourth Amendment rule that "'the police must, whenever practicable, obtain advance judicial approval of searches and

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80/ "Q [Defense Counsel] [Could you seize] [a]nything that you wanted to take?
A [Sheriff Hammermeister] Well, if it was relevant to the case.
Q But deemed in your own mind as to whether or not it was relevant?
A Yes.
Q If you thought that the kitchen stove was relevant you would have taken that?
A Yes, if I felt that the stove was -- well, if I felt that I could justify the kitchen stove as relevant to the case, yes.
Q You felt that this would have given you authority to take that, or the radio or TV?
A If it fell into either evidence or contraband.
Q But as you saw it?
A Yes."

Ibid.

81/ The boots and shirt constituted evidence against petitioner only as the result of microscopic analysis of them which showed that the boots had a small trace of blood on them (T. 1035) and that their soles matched prints inside abandoned overshoes which had blood and brain tissue on them. (T. 1062). These abandoned overshoes were not found until the day after the seizure of the boots from petitioner's house T. 2140. The shirt similarly was found to have a trace of blood on it. T. 1205. Sheriff Hammermeister testified that he seized the boots because he thought they matched "footprints at the teacherage on the northwest corner of the school" and he "just had the strongest feeling about them." Deposition of Sheriff Hammermeister, Ct. File Item 30, at pp. 67-68. He similarly testified that he could not "recall" anything unusual about the jacket. Id. at 69.

seizures through the warrant procedure.'" Chimel v. California, 395 U.S. 752, 762 (1969) (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968) (emphasis added). See, e.g., United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 309-310, 315-318 (1972); Vale v. Louisiana, supra; Camara v. Municipal Court, 387 U.S. 523, 528-529 (1967). The Fourth Amendment requires expressly that search warrants "particularly" describe not only "the place to be searched," but also the "persons or things to be seized." Berger v. New York, 388 U.S. 41, 55-60 (1967). The very premise of this requirement is, of course, that officers conducting a search pursuant to a warrant may properly seize only items specifically and particularly described in the warrant. Stanford v. Texas, supra, 379 U.S. at 481-486. Such a limitation of the seizure power is not adventitious or trivial, but rather embodies the most fundamental lesson of the history that gave rise to the constitutional guarantee against unreasonable searches and seizures: the dangers and abuses of the general warrant. See, e.g., Marcus v. Search Warrant, 367 U.S. 717, 724-729 (1961); Boyd v. United States, 116 U.S. 616, 624 (1886); T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 23-47 (1969).

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

Marron v. United States, 275 U.S. 192, 196 (1927).

This Court's decision in Stone v. Powell, __U.S. __, 49 L.Ed.2d 1067 (1976), makes review of these substantial Fourth Amendment questions particularly critical, for if this Court does not consider whether petitioner's life is to be taken on the basis of palpable violations of the

Fourth Amendment no other court will.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

NO. 76-6714

DUNCAN PEDER McKENZIE, JR.,

Petitioner,

-v-

STATE OF MONTANA,

Respondent.

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RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

The respondent respectfully opposes issuance of a writ of certiorari in the above entitled matter. The questions presented by the Petition have been fully and carefully decided by the Montana Supreme Court in accord with the applicable decisions of this Court. No new, substantial federal questions are raised.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In addition to those constitutional and statutory provisions set forth in the petition, this case also involves the following provisions of the Montana Revised Codes, 1947:

Section 95-2201, R.C.M. 1947:

> "This chapter shall be liberally construed to the end that persons convicted of a crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities; that dangerous offenders shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, or fine whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the individual.

Section 95-2502, R.C.M. 1947:

> "Any person sentenced to a term of one (1) year or more in the state prison by any court of competent jurisdiction may, within sixty (60) days from the date such sentence was imposed, except in any case in which a different sentence could not have been imposed, file with the clerk of the district court in the county in which judgment was rendered, an application for review of the sentence by the review division. Upon imposition of the sentence the clerk shall give written notice to the person sentenced of his right to make such a request. Such notice shall include a statement that review of the sentence may result in decrease or increase of the sentence within limits fixed by law. The clerk shall transmit such application to the review division and shall notify the judge who imposed the sentence, and the county attorney of the county in which the sentence was imposed. Such judge may transmit to the review division a statement of his reasons for imposing the sentence, and shall transmit such a statement within seven (7) days, if requested to do so by the review division. The review division may for cause shown consider any late request for review of sentence and may grant such request. The filing of an application for review shall not stay the execution of the sentence."

Section 95-2503, R.C.M. 1947:

> The review division shall, in each case in which an application for review is filed in accordance with 95-2502, review the judgment so far as it relates to the sentence imposed, either increasing or decreasing the penalty, and any other sentence imposed on the person at the same time, and may order such different sentence or sentences to be imposed as could have been imposed at the time of imposition of the sentence under review, or may decide that the sentence under review should stand. In reviewing any judgment, said division may require the production of presentence reports, and any other records, documents, or exhibits relevant to such review proceedings. The appellant may appear and be represented by counsel, and the state may be represented by the county attorney of the county in which the sentence was imposed. If the review division orders a different sentence, the court sitting in any convenient county shall resentence the defendant as ordered by the review division. Time served on the sentence reviewed shall be deemed to have been served on the sentence substituted. The decision of the review division in each case shall be final and the reasons for such decision shall be stated therein. The original of each decision shall be sent to the clerk of the

court for the county in which the judgment was rendered and a copy shall be sent to the judge who imposed the sentence reviewed, the person sentenced, the principal officer of the institution in which he is confined and the decision shall be reported in the Montana Reports."

Section 95-2601, R.C.M. 1947:

"Any person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims sentence was imposed in violation of the constitution or the laws of this state or the Constitution of the United States, or that the court was without jurisdiction to impose such sentence, or that sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, upon any ground of alleged error available under writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy may move the court which imposed the sentence or the supreme court or any justice of the supreme court to vacate, set aside, or correct the sentence."

Section 95-2602, R.C.M. 1947:

"The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place or the clerk of the supreme court a verified petition. The clerk shall docket the petition upon its receipt and bring the same promptly to the attention of the court."

Section 95-2603, R.C.M. 1947:

"The petition shall identify the proceeding in which the petitioner was convicted, give date of the rendition of the final judgment complained of, and clearly set forth the alleged violation or violations. The petition shall have attached thereto affidavits, records or other evidence supporting its allegations or shall state why the same are not attached. They shall identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Arguments and citations and discussion of authorities shall be omitted from this petition."

Section 95-2604, R.C.M. 1947:

"A motion for such relief may be made at any time after conviction."

Section 95-2608, R.C.M. 1947:

"Either the petitioner or the state may appeal to the supreme court of Montana from an order entered on the motion. The appeal shall be taken within six (6) months from the entry of the order."

Section 95-2203, R.C.M. 1947:

"No defendant convicted of a crime which may result in commitment for one (1) year or more in the state prison, shall be sentenced or otherwise disposed of before a written report of investigation by a probation officer is presented to and considered by the court, unless the court deems such report unnecessary. The court may, in its discretion, order a presentence investigation for a defendant convicted of any lesser crime or offense."

Section 95-2204, R.C.M. 1947:

"Whenever an investigation is required, the probation officer shall promptly inquire into the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; the time the defendant has been in detention; and the harm to the victim, his immediate family, and the community. All local and state mental and correctional institutions, courts, and police agencies shall furnish the probation officer on request the defendant's criminal record and other relevant information. The investigation shall include a physical and mental examination of the defendant when it is desirable in the opinion of the court."

Section 95-2501, R.C.M. 1947:

"The chief justice of the supreme court of Montana shall appoint three (3) district court judges to act as a review division of the supreme court and shall designate one of such judges to act as chairman thereof. The clerk of the Montana supreme court shall record such appointment and shall give notice thereof to the clerk of every district court. This review division shall meet at least four (4) times a year or more as its business requires as determined by the chairman. The decision of any two (2) of such judges shall be sufficient to determine any matter before the review division. No judge shall sit or act on a review of sentence imposed by him. In any case in which review of a sentence imposed by any of the judges serving on the review division is to be acted on by said division, the chief justice of the supreme court of Montana may designate another judge to act in place of such judge. The review division shall hold its meetings at Deer Lodge, and may adopt any rules and regulations which will expedite their review of sentences. The division is also authorized to appoint a secretary and such clerical help as it deems adequate and fix their compensation."

INTRODUCTORY STATEMENT

The petitioner seeks review of his convictions of deliberate homicide by means of torture and aggravated kidnaping. Petitioner's conviction and death sentence were affirmed by the Montana Supreme Court on November 12, 1976, rehearing denied January 10, 1977. State v. McKenzie, ___ Mont. ___, 557 P.2d 1023 (1976). Petitioner's sentence has been stayed by the district court imposing sentence pending action on the instant petition. A copy of the "Order Staying Execution of Judgment" is set out in Addendum-A.

The crimes of which petitioner was convicted were particularly brutal and vicious. The victim, a young woman, school teacher in rural Montana, was found dead on January 23, 1974, clothed only in a shirt, sweater and bra, having been savagely beaten about the body and head. (Tr. 560-571, 577-579, 1397.) The death blow laid open the right side of her head (Tr. 560-565; 577-579), with death following the blow by minutes (Tr. 564). A rope was around her neck (Tr. 553, 585-586) at the time her body was discovered and the forensic pathologist who autopsied the body testified that the pressure of the rope would have caused death by strangulation if it had not been released; he further testified that the strangling pressure had been released approximately thirty minutes prior to death. (Tr. 585-594, 717-719.) There was evidence that the victim had been raped. Semen was found on her body and in her vagina. (Tr. 601-604, 607-613.) There was a laceration near the vaginal orifice. (Tr. 601, 609-611.)

The evidence connecting the defendant with these crimes has been extensively stated in both the opinion below and the Petition. Respondent adopts the factual statement of the Montana Supreme Court. Although there is some disagreement between the court's factual statement and that of petitioner's, as well as a need to provide some additional facts, the

areas of disagreement and the additional facts are directly responsive to specific arguments of the petitioner and are therefore referred to in respondent's argument, infra.

Respondent does not dispute the petitioner's citation of the case below or his jurisdictional allegation.

ARGUMENT

I. The Imposition Of The Death Penalty Meets The Constitutional Standards Announced In Gregg v. Georgia, 428 U.S. 153 (1976), And Its Companion Cases.

Petitioner was found guilty of deliberate homicide and aggravated kidnaping. In connection with its guilty verdicts, the jury entered separate findings that the homicide was committed by means of torture and the victim died as the result of the kidnaping. The judge who imposed sentence stated that the crimes were of equal gravity and seriousness ("Findings, Conclusion, Sentence and Order", Ct. File Item 169, page 7), and imposed the sentence of death on account of both crimes (Ibid).

The petitioner attacks the imposition of the death penalty on four grounds, all but one of which are directed to Montana's death penalty statutes generally rather than the particular facts of the petitioner's case. The Montana Supreme Court gave careful and lengthy consideration to the petitioner's arguments, specifically applying the principles and standards of the 1976 death penalty cases of Gregg v. Georgia, 428 U.S. 153, 49 L.Ed. 2d 859 (1976); Proffitt v. Florida, 428 U.S. 242, 49 L.Ed. 2d 913 (1976); Jurek v. Texas, 428 U.S. ____, 49 L.Ed. 2d 929 (1976); Woodson v. North Carolina, 428 U.S. 280, 49 L.Ed. 2d 944 (1976); and Roberts v. Louisiana, 428 U.S. 325, 49 L.Ed. 2d 974 (1976); it upheld the constitutionality of the death penalty. State v. McKenzie, supra, 555 P.2d at 1034. The opinion of the court and a concurring opinion of Justice Haswell answer the petitioner's present contentions. Respondent has therefore limited its argument to supplementing the reasoning of the court below and meeting the specific allegations of the petition.

Furman v. Georgia, 408 U.S. 238 (1972) condemned state death penalty statutes existing in 1972 on the finding that the imposition of the death penalty was left to the uncontrolled discretion of judges and juries, with the result that it was being arbitrarily and discriminatorily applied.[1] Thereafter, Montana was one of many states enacting new death penalty statutes in an attempt to meet and overcome the constitutional infirmity found by Furman. Montana's death penalty statutes were enacted in 1973 as a part of its comprehensive new criminal code. State v. McKenzie, supra, 557 P.2d at 1029.

At the time petitioner was sentenced to death, the applicible sentencing provisions for deliberate homicide were Section 94-5-102, 1947 Revised Codes of Montana, and Section 94-5-105, 1947 Revised Codes of Montana. Section 94-5-102 provided in relevant part:[2]

> "94-5-102. Deliberate homicide.
> * * *
> (2) A person convicted of the offense of deliberate homicide shall be punished by death as provided in section 94-5-105, or by imprisonment in the state prison for any term not to exceed one hundred (100) years."

Section 94-5-105 provided in relevant part:[3]

> "94-5-105. Sentence of death for deliberate homicide. (1) When defendant is convicted of the offense of deliberate homicide the court shall impose a sentence of death in the following circumstances, unless there are mitigating circumstances:
> (a) The deliberate homicide was committed by a person serving a sentence of imprisonment in the state prison; or
> (b) The defendant was previously convicted of another deliberate homicide; or
> (c) The deliberate homicide was committed by means of torture; or
> (d) The deliberate homicide was committed by a person lying in wait or ambush; or
> (e) The deliberate homicide was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person."

1/ See separate, concurring opinions of Justices Douglas, Brennan, Stewart and White.

2/ Section 94-5-102 remains in effect, unamended to the present date.

3/ Section 94-5-105 was amended subsequent to petitioner's trial by Montana Session Laws of 1974, Section 1, Chapter 262, which added a subsection (2) providing a mandatory death

The applicable sentencing provisions for aggravated kidnaping were Section 94-5-303, 1947 Revised Codes of Montana, and Section 94-5-304, 1947 Revised Codes of Montana. Section 94-5-303 provided in relevant part: [4]

> "94-5-303. Aggravated kidnaping.
> * * *
> (2) A person convicted of the offense of aggravated kidnaping shall be punished by death as provided in section 94-5-304, or be imprisoned in the state prison for any term not to exceed one hundred (100) years unless he has voluntarily released the victim, alive, in a safe place, and not suffering from serious bodily injury, in which event he shall be imprisoned in the state prison for any term not to exceed ten (10) years."

Section 94-5-304 provided in relevant part: [5]

> "94-5-304. Sentence of death for aggravated kidnaping. A court shall impose the sentence of death following conviction of aggravated kidnaping if it finds that the victim is dead as the result of the criminal conduct, unless there are mitigating circumstances."

In Gregg v. Georgia, supra, this court held that carefully drafted death penalty statutes which particularize and restrict sentencing discretion in death penalty cases are not unconstitutional, but the petitioner contends, as did the petitioner in Gregg, [6] that post-Furman Montana death penalty statutes have made only cosmetic changes and continue to permit the arbitrary and capricious application of the death penalty which was condemned by Furman. Careful analysis of the Montana statutes refutes these contentions.

The decisions in Gregg and its companion cases do not mandate any particular death penalty statute. The Georgia, Florida and Texas statutes upheld in Gregg, Proffitt, and Jurek differ in important respects. The Florida statute delegated the sentencing decision to the trial judge while the Texas and Georgia statutes delegated the decision to the jury. The Texas statute differed from the Georgia and Florida ones in providing for consideration of statutory aggravating circumstances at the guilt determining stage of trial rather than the sentencing stage. All three statutes differed as to the enumerated aggravating and mitigating circumstances, although there was overlap. What the statutes all shared in common were: Their restriction of the imposition of the death penalty to a few, limited classifications of aggravated homicide; their requirement that specified mitigating circumstances relating to the individual defendant and crime be considered in determining whether to impose the death penalty; and their provision for prompt judicial review of the sentencing decision. The Montana death penalty statutes share those same features.

The separate finding of one of the aggravating circumstances enumerated in Section 94-5-105, 1947 Revised Codes of Montana, or Section 94-5-304, 1947 Revised Codes of Montana, was a prerequisite to consideration of the death penalty in the petitioner's case. The aggravating curcumstances enumerated by those sections are even more limited than the eight circumstances reviewed in Proffitt and the ten circumstances

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sentence, without consideration of mitigating circumstances, for defendants convicted of deliberate homicide in which the victim was a peace officer killed while performing his duty. Newspaper reports available to respondent indicate that this court in Roberts v. Louisiana, decided June 6, 1977, held unconstitutional a Louisiana mandatory death sentence for persons convicted of killing police officers, raising serious questions of constitutionality of the 1974 amendment to Section 94-5-105. This amendment, however, is not at issue in the present case.

4/ Section 94-5-303 remains in effect, unamended to the present date.

5/ Subsequent to petitioner's trial the Montana legislature amended Section 94-5-304 to delete the words "unless there are mitigated circumstances". Montana Sessions Laws of 1974, Chapter 125, Section 1. See note 2, supra.

6/ "The petitioner contends, however, that the changes in the Georgia sentencing procedures are only cosmetic, that the arbitrariness and capriciousness condemned by Furman continue to exist in Georgia - both in traditional practices that still remain and in the new sentencing procedures adopted in response to Furman." Gregg v. Georgia, supra, 428 U.S. at ___, 49 L.Ed. 2d at 889.

reviewed in Gregg.[7] In both Gregg and Proffitt, the respective petitioners contended that the enumerated circumstances were so vague and broad that the death sentence could be imposed for virtually any first degree murder conviction. Like the statutory scheme in Proffitt, aggravating circumstances under the Montana statutes are considered by the jury at the guilt determining stage of trial.

Much of the petitioner's argument attacking the Montana death penalty statutes is directed to the "mitigating circumstances" feature of the statutes. He argues specifically that the Montana statutes give the judge who imposes sentence broad and unguided discretion, asserting in his Petition at page 25-26 that "neither the aggravating or mitigating factors (taken into consideration by the judge when imposing sentence) have any statutory basis." Such is not the case! The petitioner's argument is based on an incomplete understanding of Montana sentencing requirements. The concurring opinion of Justice Haswell in the opinion below, points out that the death penalty statutes, and in particular the provisions requiring consideration of mitigating circumstances, must be read in conjunction with Montana sentencing statutes of general applicability:

7/ The aggravating circumstances specified by the Montana statutes are similar to the circumstances enumerated in the Florida statute considered in Proffitt, 428 U.S. at ___, 49 L.Ed. 2d at 921 (footnote 6), and the Georgia statute considered in Gregg, 428 U.S. ___, 49 L.Ed 2d at 870 (footnote 9). Subsection (c) of Section 94-5-105, covering homicide committed by means of torture is similar to subsection (h) of the Florida statute which provides, "(h) the capitol felony was especially heinous, atrocious or cruel", and subsection (b)(7) of the Georgia statute, which provides, "(7) the offense of murder, rape, armed robbery or kidnaping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." The jury was instructed at petitioner's trial that torture meant that the petitioner purposely and knowingly inflicted cruel suffering on the victim for the purpose of extorting something from her, persuading her against her will or satisfying some untoward propensity of the petitioner. (Prelim. Instr. 29-II and Add. Instr. 34, Ct. File Item 154.) The aggravating circumstance for kidnaping, the death of the victim, corresponds to the felony-murder circumstance of subsection (d) of the Florida statute and subsection (b)(2) of the Georgia statute.

> * *** Defendant urges that the "unless" (there are mitigating circumstances) clause may purport to circumscribe the sentencing judge's authority, but that there are no guiding standards nor sources of information provided for. This argument ignores the second statutory provision relevant here, that is, the presentence investigation and report provisions. Section 95-2203, R.C.M. 1947, requires a written presentence investigation report to be delivered to and considered by the sentencing court in felony cases. Section 95-2204, R.C.M. 1947, provides the report shall contain information respecting 'the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; * * * and the harm to the victim, his immediate family, and the community'. The report provides the sentencing authority with whatever curcumstances may exist in mitigation of the defendant's conduct.
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> Reading the two provisions together, the sentencing court is required to consider mitigating circumstances, and is required to consider the presentence investigation report which must contain any matters relevant to mitigation. In addition, all sentencing courts are directed by section 95-2201, R.C.M. 1947, to perform their sentencing functions 'to the end that persons convicted of a crime shall be dealt with in accordance with their individual characteristics, circumstances, needs and potentialities'. This mandates the imposition of sentences which are not disproportionate to the severity of the crime. Finally, the defendant is authorized to seek a hearing to present to the court his testimony and evidence in mitigation of punishment." 557 P.2d at 1046.

At his sentencing hearing, the petitioner was afforded an unrestricted opportunity to present evidence rebutting any matter in his pre-sentence report, a copy of which he was furnished, and any new matter which concerned mitigation. Petitioner declined the opportunity (Tr. 2611-2612), relying instead on a "Petition and Motion in Mitigation", a copy of which is set forth as Addendum-B, and the district court specifically found that there were no mitigating circumstances and set forth the specific reasons for imposing the death penalty. ("Findings, Conclusions, Sentence and Order". Ct. File Item 169; Tr. 2613-2617.)

Section 95-2502, 1947 Revised Codes of Montana, provides for prompt judicial review of sentencing to all criminal defendants sentenced to imprisonment of one or more years. Montana Supreme Court held the provision applicable to defendants sentenced to death. State v. McKenzie, 557 P.2d at 1032. Review is by a sentencing review division of three district court judges appointed by the Chief Justice of the Montana Supreme Court pursuant to Section 95-2501, 1947 Revised Codes of Montana. Both the appellant and his counsel may appear at the review proceeding and provision is made for the production of presentence reports, and other records which are relevant to the review. Section 95-2503, 1947 Revised Codes of Montana. The sentencing review division is empowered to decrease any penalty and impose in its stead any other sentence which could have been imposed, Section 95-2503, 1947 Revised Codes of Montana, thus giving it the power to reduce a death sentence to a sentence of imprisonment if it finds mitigating curcumstances. The petitioner's claim that imposition of the death penalty violated his constitutional rights also gave him another manner of appeal, by petition pursuant to Section 95-2601, 1947 Revised Codes of Montana:

> "95-2601. Petition in the trial court. Any person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims sentence was imposed in violation of the constitution or the laws of this state or the Constitution of the United States, or that the court was without jurisdiction to impose such sentence, or that sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, upon any ground of alleged error available under writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy may move the court which imposed the sentence or the supreme court or any justice of the supreme court to vacate, set aside, or correct the sentence."

A further appeal to the Montana Supreme Court from a denial of a petition is provided by Section 95-2608, 1947 Revised Codes of Montana. Finally, the Montana Supreme Court in its opinion below recognized the constitutional issues

raised by each death sentence and has declared its jurisdiction and intention to review all death sentences, giving specific consideration to the appellate review factors outlined in Gregg at 428 U.S. at ___, 49 L.Ed 2d at 892-893. In the opinion below the Montana Supreme Court said:

> "* * * this court looks at the total record during its review to determine whether the sentence was influenced by passion, prejudice, or any other arbitrary factor; whether the evidence supports the finding of a statutory aggravating circumstance; and, whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. We affirm * * *." 557 P.2d at 1034.

In summary the Montana death penalty statutes are carefully drafted to ensure that sentencing is imposed on the basis of articulated, statutory standards relating to the circumstances of the crime and defendant. Appellate review insures statewide uniformity, consistency and fairness in imposing the death penalty.

Petitioner's argument that the decision of whether he should live or die must rest with a jury rather than a judge was rejected by this court in Profitt, where it was pointed out that judicial sentencing is not only permitted but should lead to greater consistency in imposing the death penalty. 428 U.S. at ___, 49 L.Ed. 2d at 923, (plurality opinion).

Finally, petitioner's assertion that his sentence was based upon two erroneous "factual predicates" is itself erroneous. His argument asserts that the trial judge was mistaken when he stated in his sentencing order that:

> "The evidence in this, as found by the jury, discloses a brutal, consciousless, torture, rape, and deliberate killing of a human being." ("Findings, Conclusion, and Order", Ct. File Item 169, page 7.)

Petitioner objects to the use of the word "rape". While petitioner was not convicted of the separate crime of rape, since the jury was specifically instructed not to consider

any further counts of the Information if it found petitioner guilty of deliberate homicide and aggravated kidnaping (Tr. 2592, 2595-2596), his objection overlooks both the evidence at trial and the nature of the charges of which he was convicted.

Petitioner was tried on a seven count Amended Information (Ct. File Item 74), a copy of which is set forth in Addendum-C. Count five charged petitioner with rape. All seven counts related to a single, continuous series of events involving the abduction and murder of Lana Harding. Petitioner was convicted on count two, which charged him with purposefully and knowingly causing the death of Lana Hardy while engaged in the commission or attempt to commit the crime of "sexual intercourse without consent" or "aggravated assault" and causing the death by means of torture.[8/] He was additionally convicted on count three, which charged him with the aggravated kidnaping of Lana Harding for the purpose of committing the crime of "sexual intercourse without consent" or the crime of "aggravated assault". The jury was instructed that as a prerequisite to finding petitioner guilty of the deliberate homicide charge in count two and the aggravated kidnaping charge of count three, they were required to find that petitioner committed those acts while committing or attempting to commit either the crime of "sexual intercourse without consent" or "aggravated assault". (Prem. Instr. 25 and 29-I; Add. Instr. 33 and 35. Ct. File Item 154.) The element of "torture" of the deliberate homicide required a finding that the petitioner inflicted cruel suffering upon th victim for the purpose of extorting something from the victim, pursuading the victim against her will, or satisfying some untoward propensity of the petitioner.

8/ The charge that petitioner committed the murder by "lying in wait or ambush" was withdrawn from the jury's consideration. (Tr. 2582.)

(Prelim. Instr. 29-II and Add. Instr. 34, Ct. File Item 154.) Thus, inherent in the guilty verdict was a finding that petitioner kidnaped and murdered the victim while committing or attempting to commit rape or aggravated assault, and a review of the evidence at trial demonstrates the impossibility of separating the rape element from the assault element. The victim was found not only beaten to death but was found only partially clothed, with semen on her body and in her vagina, and with a laceration adjacent to the vaginal orifice, (Tr. 601-604, 607-613.) Evidence was introduced at trial that petitioner had, a few days prior to the murder, purchased a new (used) truck and on the day prior to the discovery of the victim's body petitioner told a fellow worker that he broke in every new vehicle by having sexual intercourse in it. (Tr. 2085, 1752-1753.) A few days prior, the petitioner had stated that he had intercourse with country school teachers because they were naive and easy to get and he could "teach them". (Tr. 2054-2056.) Furthermore, the evidence of sexual attack was properly considered as a separate matter when sentencing petitioner. The evidence was related and helpful to determining the sentence, see Williams v. New York, 337 U.S. 241 (1949); and reliable, Gardner v. Florida, ___ U.S. ___, 245 U.S.L.W. 4275 (decided March 22, 1977).

Petitioner's second assertion of an erroneous factual predicate concerns a statement by the trial court that petitioner would be eligible for parole in twelve and one half years if a sentence of one hundred (100) years imprisonment were imposed. The trial court's statement was a correct statement of the law at that time. Section 95-3214, 1947 Revised Codes of Montana, provided: [9/]

9/ The reference in Section 95-3214 to Section 80-740 was changed to Section 80-1905 by amendment enacted March 11, 1974, Montana Session Laws of 1974, Chapter 120, Section 86.

> "95-3214. Parole authority and procedure. The board shall release on parole any person confined in the Montana state prison, except persons under sentence of death, when in its opinion there is reasonable probability that the prisoner can be released without detriment to himself or to the community, provided,
>
> 1. That no convict serving a time sentence shall be paroled until he shall have served at least one-quarter (1/4) of his full term, less good time allowances off, as provided in section 80-740; except that any convict serving a time sentence may be paroled after he shall have served, upon his term of sentence, twelve and one-half (12 1/2) years; " (Emphasis supplied.)

Thus, the trial court's statement was correct, and even if incorrect, the petitioner had ample opportunity to bring the alleged error to the court's attention, to the attention of the sentencing review division of the Montana Supreme Court, and finally to the Montana Supreme Court. If the statement was erroneous and the death sentence based on such statement, the sentence could have been corrected, and the fact petitioner's sentence was not changed indicates that the statement was either correct, or not the basis of the imposition of sentence. In any event, the statement was extraneous for sentencing purposes. The proper inquiry upon sentencing was whether there existed any mitigating circumstances and it is difficult to conceive how any error of a few years in parole eligibility establishes a mitigating circumstance. The trial court expressly found that there were "no mitigating circumstances". (Findings, Conclusions, Sentence and Order, page 7, Ct. File Item 169.)

II. The Trial Court's Instruction Concerning Burden Of Proof On Defense Of Mental Defect Excluding Responsibility Did Not Shift Burden Of Proof To Petitioner To Disprove One Of The Elements Of The Offenses Charged. The Instruction Did Not Violate The Constitutional Requirement That The State Prove Every Element Of A Crime Beyond A Reasonable Doubt.

The petitioner in his second assignment of error, asserts that the trial court's instruction given as Added Instruction 53, Ct. File Item 154, placed the burden of proof upon petitioner to prove that he did not have the requisite mental state which was an element of the crimes charged. He then argues that this shift in burden of proof violates the requirement that the prosecution prove every element of the crime charged beyond a reasonable doubt, citing In re Winship, 397 U.S. 358 (1970) and Mulhney v. Wilbur, 421 U.S. 684 (1975). Petitioner's construction and characterization of Added Instruction 53 misstates the content and effect of the instruction. A copy of the Instruction in question is set forth in full in Addendum-D. Except for the very last sentence of the four page instruction, the instruction deals exclusively with the traditional insanity defense.

Section 95-501, 1947 Revised Codes of Montana, comprehends what is commonly referred to as the insanity defense, providing:

> "95-501: Mental disease or defect excluding responsibility.
> (a) a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he is unable either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
> (b) As used in this chapter, the terms "mental disease or defect" does not include an abnormality manifested only by criminal or otherwise antisocial conduct."

The burden of proof of proving a defense based on mental disease or defect is upon the defendant to establish by preponderance of the evidence. Section 95-503, 1947 Revised Codes of Montana. Added Instruction 53 explains the insanity

defense in terms understandable to a jury and carefully cautions, both at the beginning and end of the instruction, that such defense was to be considered only if the jury first concluded beyond a reasonable doubt that the petitioner committed the acts charged. The first two paragraphs of the instruction provide:

I.

> "The defendant has served notice on the court that he suffers from a mental disease or defect which excludes his responsibility for the acts charged against him by the State of Montana and that he intended to introduce evidence in support of his defense.
>
> By this notice and defense the defendant does not admit that he committed the acts charged against him, but in effect says if you find beyond a reasonable doubt that I did do said acts or any of them, that because of a disease or defect of mind from which I suffered I was unable at the time to appreciate that said acts were criminal, or in the alternative, if I did appreciate the criminality of the acts I was unable because of said mental disease or defects to avoid the commission of said acts."

The last paragraph repeats the warning that defendant's crimes must be established beyond a reasonable doubt before a defense based on mental disease or defect can be considered:

> "Since the defendant, by interposing of the defense of disease or defect of the mind which excludes responsibility for conduct, does not admit any of the acts charged against him, and since the defense goes only to the mental responsibility and control of the defendant, you should first determine from the evidence in the case beyond a reasonable doubt whether the defendant did do the acts charged against him in the information. * * *"

In his Petition, the petitioner quotes and characterizes Section 53 as follows, at page 50:

> "If the jury found beyond a reasonable doubt 'that the defendant did do the act or any of the acts charged against him', without regard to what his mental state was:
>
> 'You are expressly directed by the law to deduce or reason that at the time of such conduct he was able to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.'

The above text in petitioner's brief is a misrepresentation of the jury instruction. Nowhere in the instruction is the jury charged to consider whether the defendant did the acts charged "without regard to what his mental state was". In each instance the jury was charged that they must find the petitioner guilty of the acts charged beyond a reasonable doubt and were separately charged that an element of the acts charged was the mental state of "purposely and knowingly", which they were required to find beyond a reasonable doubt in order to convict (Prelim. Instr. 7, Ct. File Item 154). Petitioner begins the foregoing quotation in a middle of sentence, with good reason, because the full text of that sentence does not support his characterization. The entire sentence reads:

> "Therefore, if you find beyond a reasonable doubt that defendant did do the act or any of the acts charged against him, you are expressly directed by the law to deduce or reason that at the time of such conduct he was able to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law."

The second paragraph of petitioner's quotation is correctly stated.

The only mention in the instruction of petitioner's mental state is at the very end of the instruction where the court permits the jury, once it has already found beyond a reasonable doubt that the petitioner committed the acts charged, to consider whether on account of mental disease or defect he was precluded from having the requisite mental state:

> "* * * If you find beyond a reasonable doubt the defendant did do said acts or any of them you must then consider whether or not the defendant has overcome the presumption of accountability and whether or not he has created a reasonable doubt in your mind as to his mental accountability and responsibility for any of the acts you may find he committed, and whether or not he could have had the requisite mental state for the act or acts which you have found he committed."

The instruction does not place the burden of disproving the mental element of the offenses of deliberate homicide and aggravated kidnaping upon petitioner but merely permits

the jury, once they had found beyond a reasonable doubt that petitioner committed homicide and kidnaping "purposely and knowingly" to then consider whether the petitioner was so afflicted with a mental disease or defect as to preclude the existence of a mental state which the jury would otherwise infer from the facts and circumstances of the crime. Consideration of mental defect or disease for such purpose is sometimes referred to as the defense of "diminished responsibility", a term which does not accurately characterize the nature of the defense, which is the proof of mental disease, defect, or derangement, short of insanity, to show lack of deliberation or premeditation. State v. Padilla, 66 N.M. 289, 347 P.2d 312, 314 (1959); and State v. Anderson, 515 S.W. 2d 534, 540 (Mo., 1974); Comment Note. - Mental or Emotional Condition as Diminishing Responsibility For Crime, 22 A.L.R. 3d 1228. The defense in Montana is provided by statute, Section 95-502, 1947 Revised Codes of Montana, which provides:

> "95-503. Mental disease or defect admissable when relevant to element of the offense. Evidence that the defendant suffered from mental disease or defect is admissable whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense."

The defense is analagous to that of insanity, State v. Holden, 85 N.M. 397, 512 P.2d 970, 972, cert. den. 85 N.M. 380, 512 P.2d 953 (N.M. Court of Appeals 1973); in that both defenses concern mental disease or defect which make the normal assumptions and inferences concerning human conduct, free will, and moral responsibility, inapplicable.

The case of Leland v. Oregon, 343 U.S. 790 (1952), which upheld the constitutionality of an Oregon statute placing the burden on a defendant to prove an insanity defense beyond a reasonable doubt, is equally applicable

to a defense of mental disease or defect excluding defendant's capacity to have a particular mental state of mind. Both defenses request the fact finder to abrogate the usual rules and assumptions concerning human conduct; both rely principally on testimony of psychiatrists, psychologists and related specialists. Many courts have pointed out the conflict in and unreliability of such expert testimony. See e.g. Greenwood v. United States, 350 U.S. 366, 375 (1956); Sauer v. United States, 241 F.2d 640, 667 (19th Cir. 1957); Commonwealth v. Carroll, 194 A. 2d 911 (Pa. 1963); Commonwealth v. Smith, 258 N.E. 2d 13, 20 (Mass. 1970) and see generally, Hall, Psychiatry And Criminal Responsibility, supra, and Hardisty, Mental Illness: A Legal Fiction, 48 Wash. L.R. 735 (1973). "The only thing which can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment ***." Greenwood v. United States, supra, 350 U.S. at 375. Placing the burden of persuasion on defendant as to prove mental defect or disease does not offend "some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental." Speiser v. Randall, 357 U.S. 513, 523 (1958)(quoting Snyder v. Massachusetts, 291 U.S. 97, 105). The assumption that the actions of defendants charged with crime are the product of free will and conscious choice is fundamental to the American system of criminal justice. See Davis v. United States, 160 U.S. 469, 486 (1895); Morissette v. United States, 342 U.S. 246, 250 (1952); and see also Hall, Psychiatry And Criminal Responsibility, 65 Yale L.J. 761 (1956). "Modern psychiatry to the contrary, the criminal law is grounded upon the theory that, in the absence of special conditions, individuals are free to exercise a choice between possible courses of conduct and hence are morally responsible." Sauer v. United States, supra, 241 F. 2d at 648. These assumptions give

rise to many inferences and presumptions regarding human conduct which are employed in criminal cases, including the inference of mental state from outward manifestations, see American Communications Association v. Douds, 339 U.S. 382, 411 (1950); the inference of criminal intent from acts of a defendant, Kawakita v. United States, 343 U.S. 717, 742 (1952) and see Cox v. Louisiana, 379 U.S. 559, 567 (1965); and a presumption that a person intends the natural consequences of his acts, Cramer v. United States, 325 U.S. 1, 31 (1945) and Agnew v. United States, 165 U. S. 36, 50 (1895). Petitioner would turn the criminal law on its head and require the state to prove beyond a reasonable doubt that the normal assumptions and inferences concerning human conduct apply to each defendant and that each defendant does not suffer from any mental defect or disease precluding the application of such inferences and assumptions. Thus, petitioner takes exception to the inference that purposeful and knowing action in a homicide case can be inferred in circumstances showing that the victim was subjected to strangulation so severe that had it not been released it would have caused her death some thirty minutes prior to actual death; that she was savagely beaten to death, the death blow laying open the entire side of her head and exposing brain tissue; and that she was found unclothed in circumstances evidencing a sexual attack. Petitioner argues, page 46 of the Petition, "during its case-in-chief, the State made no effort to prove the petitioner had committed a homicide or kidnaping 'knowingly or 'purposely'." His statement is incredible; the inference that the murder in such circumstances was done purposely and knowingly is not merely reasonable, it is overwhelming, but petitioner denies these inferences and proposes that this court should require the state to prove beyond a reasonable doubt that he had the mental capability of doing such an act purposely and knowingly. It is thus

apparent that petitioner's basic quarrel is with the fundamental premise of criminal law that men are morally accountable and responsible.

In the present case, the instructions of the trial court did not shift the burden of proof to petitioner on the mental element of the crimes charged, but merely permitted the State to prove the mental element beyond a reasonable doubt utilizing the normal inferences concerning human conduct without requiring it to prove beyond a reasonable doubt that such normal inferences and assumptions apply to the particular defendant. This case differs significantly from Mullaney v. Wilbur, supra, a case in which the prosecution was not required to establish the mental element of the offense beyond a reasonable doubt even under applicable assumptions and inferences of the criminal law.

The Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution do not require either the States or the United States to permit criminal defendants to assert and prove a defense based on lack of mental capacity to have the requisite mental element of the crime charged. See Fisher v. United States, 328 U.S. 463 (1946). Many States, such as Montana, permit the defense, but many States do not. The cases are annotated in Comment Note. - Mental or Emotional Condition as Diminishing Responsibility for Crime, 22 A.L.R. 3d 1228. There being no constitutional requirement that the defendant be permitted to raise the question of mental defect or disease excluding mental condition, it follows that the State cannot be required to prove lack of mental disease or defect beyond a reasonable doubt.

III. Requiring Petitioner To Establish A Defense Of Lack Of Criminal Responsibility On Account Of Mental Disease Or Defect By A Preponderance Of The Evidence Does Not Violate The Petitioner's Right To Due Process Of Law.

The petitioner's third assertion of error, that he bore the burden of establishing lack of criminal responsibility on account of mental disease or defect was rejected in Leland v. Oregon, 343 U.S. 790 (1952), which upheld the constitutionality of an Oregon statute requiring defendant to establish any defense of insanity beyond a reasonable doubt.

IV. Petitioner's Argument That A Tentative Plea Bargain Agreement Should Be Enforceable Even Though Defendant Has Not Entered A Guilty Plea Is "Novel" But Does Not Raise A Constitutional Question.

In Santebello v. New York, 404 U.S. 267 (1971), this Court held that when a defendant enters a plea of guilty in exhange for an agreement by the prosecutor to make no recommendation concerning sentence, the prosecutor's promise must be enforced or the defendant allowed to withdraw his guilty plea. Based on Santabello the petitioner argues that it was error for the trial court not to enforce a tentative plea agreement reached between the prosecutor and defense counsel. Petitioner cites no case enforcing a plea agreement prior to actual entry of a guilty plea.

The reasons for enforcing a plea bargain agreement in cases where a defendant has pleaded guilty in reliance upon promises of the prosecutor are evident. The defendant, by his guilty plea, gives up substantial basic constitutional rights, including the right to trial by jury; the right to be confronted by witnesses; and the right against self-incrimination. In the present case the petitioner did not give up substantial rights. At most he disclosed vague matters of trial strategy employed by defense counsel in general. Further, the disclosures were not requested by the prosecution and were apparently made by defense counsel in an attempt to clinch the tentative agreement.

Petitioner's version of the plea bargaining powers is set forth in his attorney's affidavit dated December 30, 1974 (Ct. File Item 99), a copy of which is set forth as Addendum-E. Several noteworthy matters appear in the affidavit. First, the information which was allegedly disclosed by defense counsel is set forth in the most general and self-serving terms:

> "Subsequent to this meeting with the court, counsel for the Prosecution and the Defendant met in the O'Haire Manor; pursuant to the tacit agreement to aid the Prosecution control the influence of public opinion by the Sheriff of Pondera County, (sic) your affiant outlined the strategy and those facts that would have been emphasized by the defense had this matter gone to trial; that your affiant explained to the Prosecution its problem areas of proof as visualized by counsel for the defense; that this information was provided to justify the agreements heretofore entered into and to explain to the Sheriff that it was through his own ineptitude that put the prosecution to the problem of possibly not being able to get certain very pertinent evidence before the Court and jury and where certain assumptions being made by the Sheriff and Prosecution were fallacious. * * *" (Page 4.) (Emphasis Supplied)

Nowhere does petitioner explain how such disclosure, whatever it was, interfered with his defense or gave the prosecution an unfair advantage. He did not waive any right to object to admission of evidence based on ineptitude in the investigation, and how the prosecutor could have avoided such objections if raised is a matter of speculation. In footnote 13 to his Petition, the petitioner asserts that difficulty in establishing the chain of evidence was one of the primary weaknesses of the State's case, pointed out to the prosecutor, but where this fact appears in the record, and the exact nature of such disclosure, is not revealed and remains an enigma to respondent. Second, the affidavit shows that plea bargaining was initiated by defense counsel and reluctantly approached by the prosecutor. Defense counsel broached the subject to the prosecutor on December 9, 1974, almost a year after petitioner's arrest and a few weeks prior to trial. He subsequently renewed the subject but the prosecutor "left your affiant with the impression that he either did not appreciate the nature of your affiant's effort or that he would have to secure the advice of the Special Prosecutor * * *." (Affidavit, Page 1.) Meaningful negotiations did not begin until December 20, 1974 and defense counsel expresses his continuous awareness of the prosecutor's fears of public reaction to any plea bargain,

a concern that defense counsel concedes continued to the date he made his purported defense strategy disclosures. The disclosures were admittedly made in an effort to calm possible public reaction. Nowhere does it appear that the prosecutor requested the information disclosed. Finally, the affidavit contains conclusory statements of defense counsel's "understanding" that a "final and complete bargain" had been struck on December 23, 1974 (page 4) but no evidence is offered to show that the prosecutor committed himself to any agreement. The evidence upon which the petitioner requests this Court to review and enforce the purported plea agreement shows no more than defense counsel's voluntary disclosure of vague information concerning trial strategy in an effort to "nail down" a favorable plea arrangement for his client.

V. Probable Cause Did Exist To Search Petitioner's Residence And Truck, The Search Warrant Did Not Authorize A General Search, And The "Plain View" Doctrine Authorized The Seizure Of Evidence Not Described In The Search Warrant.

As a fifth issue, petitioner argues that the introduction at trial, of evidence seized from his residence and his truck, pursuant to a search warrant, violated his rights under the Fourth Amendment to the Constitution of the United States. His argument is specifically twofold: (1) that nothing was presented to the issuing magistrate to furnish probable cause to search petitioner's residence or truck; and (2) that certain items seized in the search were not particularly described in the search warrant, and therefore should have been suppressed upon his motion.

The sequence of events leading to the issuance of the search warrant in question, as stated by petitioner, are substantially correct. However, petitioner has merely highlighted parts of the affidavit requesting the warrant. Respondent respectfully submits that a better understanding of the facts pertinent to this issue are more readily understandable from the affidavit and the search warrant themselves.

In addressing petitioner's initial argument, the court should keep in mind its well established principles concerning probable cause, search warrants, and the proper scope of review to be exercised by appellate courts. As stated in Spinelli v. United States, 393 U.S. 410, 419, 21 L.Ed 2d 637, 89 S.Ct. 584 (1969):

> "In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity, is the standard of probable cause, that the affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, and that their determination of probable cause should be paid great deference by reviewing courts." (Emphasis supplied.)

Furthermore, the court stated in Aguilar v. Texas, 378 U.S. 108, 12 L.Ed 2d 723, 84 S.Ct 1509 (1964), and again in U.S. v. Ventresca, 380 U.S. 102, 105, 13 L.Ed 2d 684, 85 S.Ct. 741 (1965):

> "An evaluation of the constitutionality of a search warrant should begin with the rule that the informed and deliberate determinations of magistrates empowered to issue warrants are to be preferred over the hurried action of officers ... who may happen to make arrests."
>
> "In Jones v. U.S. (citation omitted) this court, strongly supporting the preference to be accorded searches under a warrant, indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall."

Keeping these principles in mind, it is apparent that the issuing magistrate did indeed use common sense in directing a search to be made of petitioner's residence and truck.

First of all, a common-sense reading of the affidavit certainly presents the probability of criminal activity. Lana Harding, a conscientious school teacher, was not present at her school class on January 22, 1974 and she lived next door to the classroom in a teacherage. There was evidence of a scuffling inside the teacherage, evidence of an object being dragged from the teacherage outside, one tennis shoe with the bow tied was found outside the teacherage, and blood stains, along with a woman's watch, were found near the teacherage.

Secondly, the petitioner was connected to the scene of the alleged crime. Petitioner's black Dodge pickup, which was newly acquired from a resident of the area, and which was familiar to residents of the area, was stalled within one hundred feet of the teacherage on the night of January 21, 1974. Petitioner sought the help of Don Pearson, who resides next to the teacherage, in starting petitioner's pickup, approximately between 8 p.m. and 8:30 p.m. At this time, petitioner appeared nervous, excited and out of

breath. Furthermore, the woman's watch and the blood stains were found in the area where petitioner's truck was stalled.

It appears petitioner is indeed placing restrictions upon the issuing magistrate's common sense by insisting that no probable cause existed to search petitioner's residence or truck. The truck was concretely connected with the scene of the crime and petitioner. Don Pearson helped petitioner start his truck, which was stalled within one hundred feet of the teacherage in the vicinity where the blood stains and the woman's watch were subsequently found. A careful reading of the petitioner's argument reveals that his main objection is to the introduction of a pair of Red Wing boots and a plaid jacket found at petitioner's residence, and an argument aimed at the search of the truck is not wholeheartedly made by petitioner.

As for the search of petitioner's house, the affidavit requested a search warrant to obtain any evidence leading to the disappearnce of Lana Harding, including certain articles of clothing worn by petitioner on the night of January 21, 1974. Again, a common-sense conclusion would be that which was made by the magistrate, namely that petitioner's clothing could be located at his residence. Of course, one can dream up a number of possibilities other than this, but the logical conclusion is that arrived at by the issuing magistrate. Respondent respectfully suggests the court keep in mind its policy statements found in United States v. Ventresca, supra, 108-109:

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." * * * (Emphasis supplied).

> "However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hyper-technical, rather than a common-sense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

Petitioner begins the second phase of his search and seizure argument by attacking the validity of the search warrant on its face, alleging that it is a general warrant. Such is not the case. We agree that searches under indiscriminate and general authority are prohibited, and that warrants are therefore required to particularly describe the places to be searched and the persons or things to be seized. Warden v. Hayden, 387 U.S. 294, 18 L.Ed 2d 782, 87 S.Ct. 1642 (1967). The warrant in question specifically described the petitioner's residence and truck as the places to be searched. Furthermore, the warrant specifically described certain articles of clothing to be seized.

The legality of the warrant on its face was not destroyed by the use of the phrase "and any other contraband articles", as contended by petitioner. This warrant did not authorize an exploratory search. The true test of the warrant on its face is whether the place to be searched and the items to be seized were as precisely identified in the warrant as the nature of the activity permitted. James v. United States, 416 F.2d 467 (5th Circuit, 1969), cert. den. 397 U.S. 907 (1970) Furthermore, the James case stated that when an exact description of instrumentalities is made virtually impossible by the circumstances, the generic class of the items to be seized is sufficient.

Such was the case here. The petitioner, his truck, and his residence were sufficiently linked to the alleged crime. However, as to the evidence which might be connected with the disappearance of Lana Harding, at the time the warrant

was issued, only the clothing described therein was truly known, this from a description of the petitioner and the alleged victim, Lana Harding. Consequently, the places to be searched and the items to be seized were as precisely described as the circumstances would allow.

Furthermore, the phrase "any other contraband" is similar to the phrase "any other evidence", which has been held to be legally acceptable, and not an authorization for a general search. Quigg v. Estelle, 492 F.2d 343 (9th Cir. 1974), cert. denied 419 U.S. 848 (1974). As Quigg points out such a phrase is merely a codification of the authority officers have to seize certain items under the "plain view" doctrine. The situation is best described in Quigg, supra, 1345;

> "It would be incongruous to make illegal what may otherwise be done legally simply because it was contained within the warrant."

For these reasons the search warrant in question was not invalid on its face and did not authorize a general search as contended by Petitioner.

The next phase of petitioner's second issue is whether certain items not described in the search warrant were illegally seized.

Petitioner cites a 1927 holding for the principle that an executing officer can only seize those items listed in the warrant and no others. Marron v. United States, 275 U.S. 192, 72 L.Ed 231, 48 S.Ct. 74 (1927). However, the modern trend of the law has altered this strict compliance approach by addressing the reality of the situation. The fact that certain items seized were not specifically described does not necessarily mean they were seized illegally.

Under the "plain view" doctrine police may seize evidence in plain view without a warrant when certain circumstances exist. Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed 2d 564, 91 S.Ct. 2022 (1971). The court set forth a situation identical to the present case in enunciating acceptable examples of the doctrine at work, stating:

> "An example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character." Coolidge v. New Hampshire, supra, 465.

In the case at hand the police were conducting a search pursuant to a valid warrant when in the course of such search they came across other evidence of an incriminating nature.

This case also meets the three requirements of the "plain view" doctrine as set forth in Coolidge: 1) the initial intrusion of the police was justified by a valid search warrant; 2) the discovery of the unlisted items was inadvertent (the police did not have prior knowledge of and prior intent to seize those items not described in the warrant, nor does the petitioner argue that such was the case); and 3) the evidence seized was of an incriminating nature.

Petitioner argues that two of the unlisted items seized, a pair of Red Wing boots and a plaid jacket, were not apparently incriminating, since blood traces were not found without a subsequent scientific analysis. However, this conclusion would be to ignore the testimony given by the executing officer at the suppression hearing, wherein he stated that the Red Wing boots were seized because their tread design was similar to two tracks observed outside the teacherage, and that the clothing seized was basically that which an individual observed petitioner wearing on the night of the homicide. This testimony satisfies the definition of incrimination objects, which is when the seizing authorities have reasonable or probable cause to believe that the object is evidence of a crime. U.S. v. Ross, 527 F.2d 984 (4th Cir. 1976), cert. denied 424 U.S. 945 (1976); U.S. v. Sedillo, 496 F.2d 151 (9th Cir. 1974), cert. denied 419 U.S. 947 (1974). In passing we note that Petitioner does not argue that any of the other evidence seized in the search, except the boots and jacket, were not incriminating, which included

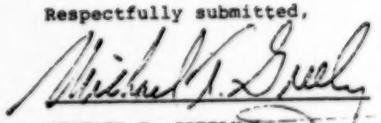
an exhaust manifold with human blood of the same type and Rh factor of Lana Harding, as well as brain and cortical tissue on it, and human blood on the bed and springs of the truck.

Therefore, probable cause did exist to search Petitioner's residence and truck, the search warrant was valid on its face, and the evidence not described in the search warrant was legally seized under the "plain view" doctrine.

CONCLUSION

Respondent prays that the petition for a writ of certiorari be denied.

Respectfully submitted,



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